CASES DECIDED

IN

THE UNITED STATES COURT OF CLAIMS

FEBRUARY 1, 1976 TO APRIL 30, 1976

WITH

REPORT OF DECISIONS OF THE SUPREME COURT IN COURT OF CLAIMS CASES

REPORTED BY

AUDREY BERNHARDT

REPORTER

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JUDGES AND OFFICERS OF THE COURT

Chief Judge
WILSON COWEN

Judges

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BYRON SKELTON
PHILIP NICHOLS, JR.
SHIRO KASHIWA
ROBERT L. KUNZIG
MARION T. BENNETT

Senior Judges

MARVIN JONES[1]
JAMES R. DURFEE
DON N. LARAMORE

Chief, Trial Division
ROALD A. HOGENSON

Trial Judges

C. MURRAY BERNHARDT
MASTIN G. WHITE[2]
LLOYD FLETCHER
GEORGE WILLI
LOUIS SPECTOR
DAVID SCHWARTZ
HARRY E. WOOD
JOSEPH V. COLAIANNI
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[1] Sr. Judge Jones died March 4, 1976.
[2] Retired, effective January 1, 1971, and recalled as a senior trial judge.

ASSISTANT ATTORNEYS GENERAL

(Charged with the defense of the Government)

FEBRUARY 1, 1976 to APRIL 30, 1976

PETER R. TAFT
Land and Natural Resources Division

SCOTT P. CRAMPTON
Tax Division

REX E. LEE
Civil Division

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No. 11730 dated July 18, 1973; Tony Downs Foods Co.

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DESIGNATIONS OF JUDGES OF THE UNITED STATES COURT OF CLAIMS FOR SERVICE ON THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

The Chief Justice of the United States, the Honorable Warren E. Burger, pursuant to the authority vested in him by Title 28, United States Code, on March 18, 1976 individually designated and assigned the following judges of the United States Court of Claims to perform judicial duties of a judge of the United States Court of Customs and Patent Appeals for the period April 1, 1976 to March 31, 1977 and for such additional time in advance thereof to prepare for the trial of cases, or thereafter as may be required to complete unfinished business:

Wilson Cowen, Chief Judge
Oscar H. Davis
Byron Skelton
Philip Nichols, Jr.
Shiro Kashiwa
Robert L. Kunzig
Marion T. Bennett

DESIGNATIONS OF JUDGES OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS FOR SERVICE ON THE UNITED STATES COURT OF CLAIMS

The Chief Justice of the United States, the Honorable Warren E. Burger, pursuant to the authority vested in him by Title 28, United States Code, on March 18, 1976 individually designated and assigned the following judges of the United States Court of Customs and Patent Appeals to perform judicial duties of a judge of the United States Court of Claims for the period April 1, 1976 to March 31, 1977 and for such additional time in advance thereof to prepare for the trial of cases, or thereafter as may be required to complete unfinished business:

Howard T. Markey, Chief Judge
Giles S. Rich
Phillip B. Baldwin
Donald E. Lane
Jack R. Miller

207-954—77——2

CASES DECIDED
IN
THE UNITED STATES COURT OF CLAIMS

FEBRUARY 1 TO APRIL 30, 1976 AND OTHER CASES NOT HERETOFORE PUBLISHED

---

530 F. 2d 378

ALLSTATE INSURANCE COMPANY v. THE UNITED STATES

[No. 382-73. Decided February 18, 1976]

ON DEFENDANT'S AND PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

Taxes; income tax; collection of income tax at source on wages; reimbursed indirect moving expenses.—Plaintiff, during taxable years 1965 through 1969, had a policy of reimbursing direct and indirect moving expenses to employees transferred to other locations at company request. Only the reimbursement of indirect moving expenses, such as expenses in selling the old residence, purchasing a new residence and related expenses, is in issue here. Plaintiff timely filed Federal employment tax returns and paid the liability thereon, but did not withhold from its employees with respect to reimbursement of indirect moving expenses. The Commissioner of Internal Revenue assessed deficiencies, asserting that the indirect moving expenses were taxable compensation to plaintiff's employees subject to withholding. Plaintiff paid the deficiencies, and upon disallowance of its claims for refund filed suit here for refund of the amount of the assessments, plus interest. It is *held*, based on *Humble Oil & Refining Co.* v. *United States*, 194 Ct. Cl. 920, 442 F. 2d 1362 (1971); *Humble Pipe Line Co.* v. *United States*, 194 Ct. Cl. 944, 442 F. 2d 1353 (1971), and other cited legal precedents, that the payments were not wages or compensation for services subject to withholding. Plaintiff's motion for summary judgment is granted, defendant's cross-motion is denied, and judgment is entered for plaintiff with the amount of recovery to be determined pursuant to Rule 131(c).

Taxes; Revenue Laws; construction and operation; generally.

[1] In interpreting statutes levying taxes, it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer.

Internal Revenue ⇐ 126

Taxes; Revenue Rulings; binding effect of.

[2] A Revenue Ruling may be helpful in interpreting a statute, but it is not binding on the Secretary of the Treasury or the courts. It does not have the effect of a Regulation or a Treasury decision.

Internal Revenue ⇐ 1202

Taxes; income tax; collection of income tax at source; wages; reimbursed indirect moving expenses.

[3] Where plaintiff-taxpayer in furtherance of its expansion relocated certain of its existing employees and defrayed their indirect moving expenses which embraced expenses of selling old residences, purchase of homes in the new location and related expenses, the payments or reimbursements to the employees did not constitute payment of wages subject to withholding within the meaning of Sec. 3401 of the Internal Revenue Code of 1954.

Internal Revenue ⇐ 1766.3

Glen H. Kanwit, for plaintiff; *William A. Cromartie*, attorney of record. *Patrick A. Heffernan*, *Hopkins*, *Sutter*, *Mulroy*, *Davis & Cromartie*, of counsel.

Donald H. Olson, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Gilbert W. Rubloff*, of counsel.

Before DURFEE, *Senior Judge*, NICHOLS and KASHIWA, *Judges*.

KASHIWA, *Judge*, delivered the opinion of the court:

This case requires us to return for a further refinement to the identical area covered in *Humble Oil & Refining Co.* v. *United States*, 194 Ct. Cl. 920, 442 F. 2d 1362 (1971), and *Humble Pipe Line Co.* v. *United States*, 194 Ct. Cl. 944, 442 F. 2d 1353 (1971). That area is the tax treatment of payments or reimbursements by an employer to employees for

moving expenses. The *Humble* cases involved the question of withholding of tax by employers on these payments. Both *Humble Oil* and *Humble Pipe* dealt with the year 1961. This case involves the quarters ending March 31, 1965, through December 31, 1969.

The case comes before this court on cross motions for summary judgment. The material facts are not in dispute. We hold for Allstate allowing its motion for summary judgment and denying defendant's motion for summary judgment, for reasons hereinafter stated.

During the taxable years 1965 through 1969, Allstate, a casualty insurance company with its principal office in Northbrook, Illinois, had in effect a written policy governing payment or reimbursement of its employees' moving expenses, titled "Employee Transfer Policy and Procedure." The written policy specified that:

> The expansion of the company requires that all offices be staffed with the best available personnel. Employees in responsible positions may be requested to relocate either to fill newly created jobs or to fill positions vacated.
>
> * * * * *
>
> Although the company will reimburse employees transferred at company request for moving expenses, moves should be made as economically as possible. No unreasonable expense should be incurred by the employee.

Pursuant to the policy, Allstate paid both direct and indirect moving expenses of its employees. Direct expenses are those incurred to transport an employee, his immediate family, household goods, and personal effects while indirect expenses are all other expenses related to the move, such as selling expenses of the old residence and the expense of house-hunting trips.[1] The direct moving expenses either paid or reimbursed by Allstate are not at issue in this case, only the indirect expenses are. The indirect moving expenses which

[1] See Rev. Rul. 65–158, 1965–1 Cum. Bull. 34.

Allstate either paid or reimbursed included the items listed in the margin.[2]

Allstate's moving expense policy was adopted for various business reasons, including Allstate's desire to have at all times the most qualified employees in the geographic locations needed by Allstate and to maintain employee morale by defraying expenses of moves at Allstate's request. Moving expense policies of the type maintained by Allstate are typical of companies of Allstate's size and geographic scope. Payments or reimbursements made by Allstate pursuant to its moving expense policy were made without regard to the employee's level of compensation, but were instead based solely on actual expenses incurred by each particular employee in moving. There was no relationship between All-

[2] In its books of account, Allstate set up two subledger categories for the payment or reimbursement of indirect moving expenses, which are at issue in this case. Account number 61–03 included the indirect expenses incurred in the sale of the employee's home at his previous location and the purchase of his home in his new location and related expenses, described in categories 1 and 2. Account number 61–04 included duplicate housing expenses, described in category 3.

Category 1. Sale of home in previous employee location:

a. real estate sales commission
b. legal fees
c. title and trust charges
d. mortgage prepayment penalties
e. surveys
f. reimbursement of loss on sale of old house, if covered under Section 346.D.12 of the policy which stated that an employee would not be reimbursed for capital losses sustained in selling his house unless he was requested to move frequently or to move twice within an eighteen-month period and was not able to sell his house on a satisfactory basis.

Category 2. Purchase of home in new location and related expenses:

a. legal fees
b. new license plates and driver's license
c. credit report regarding new mortgage, purchase of new house
d. revenue stamps
e. escrow charges
f. cleaning of house or apartment
g. installation of appliances and drapes
h. tips to movers
i. title and service charges

Category 3. Duplicate housing expenses:

a. rent on second house
b. interest, taxes, utilities and insurance on second house
c. cleaning of new house
d. rent deposit—new apartment
e. reimbursement of loss on sale of old house, if covered under Section 346.D.12 of the policy
f. rental of motel while at new location before occupying new house
g. installation of new telephone
h. cost of subleasing old apartment
i. installation of rugs and drapes

state's moving expense policy and Allstate's policy of compensating employees on the basis of the value of their services. Allstate did not solicit any commitment from employees transferred at its request and to whom moving expenses were paid or reimbursed that the employees continue in the employment of Allstate at the new location. No such commitment was considered necessary by Allstate. The amounts of reimbursed moving expenses paid by Allstate in each of the years at issue, by subledger account category, are listed in the margin.[3]

For each calendar quarter during the 1965 through 1969 period, Allstate timely filed Federal employment tax returns and timely paid the tax liability shown on each return. Allstate did not withhold from its employees with respect to its payment or reimbursement of indirect moving expenses, nor did its Federal employment tax returns reflect any withholding or any tax payments with respect to the reimbursed indirect moving expenses. The Commissioner of Internal Revenue assessed deficiencies against Allstate in the amount of $517,541.49 for the period 1965 through 1969, based upon a determination that the indirect moving expenses were taxable compensation to Allstate's employees subject to withholding under Section 3402 of the Internal Revenue Code. The detail of the deficiency computation is set forth in the margin.[4]

[3] A summary of the subledger accounts for accounts No. 61–03 and No. 61–04, referred to in footnote 2, for the years is as follows:

Taxable Year	*Allstate Account No. 61-03*	*Allstate Account No. 61-04*	*Total Indirect Moving Expenses Paid by Allstate*
1965	$465,748.15	$93,190.88	$558,939.03
1966	492,021.72	101,285.20	593,306.92
1967	726,023.94	112,567.91	838,591.85
1968	802,362.36	114,897.81	917,260.17
1969	733,254.28	85,371.96	818,626.24

[4] The deficiency computations for the years involved are as follows:

Year	*Total Indirect Moving Expenses Deemed Subject to Withholding*	*Withholding Percentage*	*Withholding Tax Deficiency*
1965	$558,939.03	12%	$67,072.68
1966	593,306.92		
	(1/1/66—6/30/66)		
	288,682.04	12%	
	(7/1/66—12/31/66)		
	304,624.88	14%	77,289.32
1967	838,591.85	14%	117,402.85
1968	917,260.17		
	(1/1/68— 6/30/68)		
	458,630.09	14%	
	(7/1/68—12/31/68)		
	458,630.08	15%	133,002.72
1969	818,626.24	15%	122,793.92

On June 4, 1971, Allstate paid the deficiencies assessed for 1965 and 1966. On October 28, 1971, Allstate paid the deficiencies assessed for 1967, 1968, and 1969 plus statutory interest. On June 1, 1973, Allstate timely filed claims for refund for each of the 20 calendar quarters encompassed in the 1965 through 1969 period, in the aggregate amount of $517,501.49 plus $61,782.74 in interest. On August 23, 1973, the Internal Revenue Service disallowed Allstate's claims for refund. Allstate then filed this action to recover the assessed deficiencies and interest aggregating $579,324.23, which it contended had been erroneously assessed and collected from Allstate.

The single question presented is whether Allstate's payment of such indirect expenses constituted the payment of "wages" within the meaning of Section 3401 [5] of the Internal Revenue Code of 1954 so that Allstate is liable for withholding taxes thereon.

In *Humble Oil & Refining Co.* v. *United States*, *supra*, and *Humble Pipe Line Co.* v. *United States*, *supra*, this court held that the plaintiffs therein did not have to withhold tax on payments made to employees for indirect moving expenses. Defendant acknowledges this court's holding but states that there have been significant changes in the law in effect after 1961, the year involved in the *Humble* cases. Defendant points to the addition by Congress of Section 217 in 1964 which permitted a deduction for direct moving expenses of all employees and Section 3401(a)(15) which excepted from the definition of "wages" for withholding tax purposes remuneration paid "to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217."

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[5] Section 3401 as material herein provides:

"SEC. 3401. DEFINITIONS.

"(a) *Wages.*—For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid—

* * * * *

"(15) to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217; or"

* * * * *

The following quotation from defendant's brief is the essence of its case. Since it is so important in order to fully comprehend defendant's argument, we quote it in full:

> By the 1964 amendment to the definition of "wages" subject to withholding in Section 3401(a), Congress thus provided that no withholding was required on amounts paid by an employer to an employee as reimbursement for *direct* moving expenses. The necessary corollary of that provision is that amounts paid as reimbursement for *indirect* moving expenses are wages subject to withholding. And without regard to the *retrospective* force of that statement of Congressional policy upon 1961 in the *Humble* cases (not commented upon in the Trial Judges' opinions), certainly it would strain the legal mind to deny the *prospective* force of that necessary implication vis-a-vis the reimbursement of indirect moving expenses. Rather than belabor this readily apparent point, we will let the 1964 Congressional action speak for itself.
>
> Shortly thereafter, on June 14, 1965, the Internal Revenue Service published Rev. Rul. 65–158, 1965–1 Cum. Bull. 34, Appendix, *infra*. That Ruling took note of the 1964 Congressional action described above, and it reaffirmed the position of the Internal Revenue Service that reimbursement of indirect moving expenses produces taxable income to the employee. Moreover, the Ruling went further and specifically provided that, on facts substantially identical to those present in the instant case, the reimbursements were "wages," and the facts substantially identical to those present in the inemployer was liable for withholding taxes.
>
> Thus by the action of Congress, and shortly thereafter by the Internal Revenue Service, taxpayer had ample notice of its duty to withhold taxes on the reimbursements of indirect moving expenses involved here. And as we clearly demonstrated herein, *supra*, the presence or absence of notice was the critical distinguishing factor in the *Humble* cases. The relevant legal developments between 1961 (the year involved in the *Humble* cases) and 1965 through 1969 (the years involved in this case), therefore, put the amounts in issue here in the same legal context as those paid to the new employees in the *Humble* cases, upon which withholding was required. [Emphasis in original. Footnotes omitted.]

Defendant attempts to use the notice argument in this case. Defendant argues that the holding of the *Humble*

cases turns solely on the fact of notice. It then draws an implication from the 1964 law and points to a revenue ruling to indicate notice of a duty to withhold taxes on reimbursements of indirect moving expenses. We wish to point out that nowhere in the *Humble Pipe* opinion is the question of notice raised. There the court held that "when the plaintiff defrayed the moving costs of its employees (irrespective of whether such costs were "direct" or "indirect"), the plaintiff was not remunerating or paying the employees for services performed." [194 Ct. Cl. at 951, 442 F. 2d at 1356.] In *Humble Oil* the court, in its answer to the question of whether the payments were remuneration for services performed so as to constitute wages, analyzed insurance company cases which held that certain convention expenses were not remuneration for services performed. The court concluded [194 Ct. Cl. at 929, 442 F. 2d at 1367] that the payments "were not meant by Humble to be in any sense compensation 'for services performed.'" The court does refer to Rev. Rul. 59–236, 1959–2 Cum. Bull. 234, requiring withholding on reimbursements of moving expenses to new employees and says in one sentence: "With knowledge of the Service position in Rev. Rul. 59–236, *supra*, Humble should have withheld on those payments totaling a little over $46,000." [194 Ct. Cl. at 932, 442 F. 2d at 1369.]

Humble Oil was a little different from *Humble Pipe*. New employees were involved but under Finding 11 their reimbursed expenses were only direct moving expenses. There are no direct expenses involved here so that portion of *Humble Oil* is irrelevant to this case. An examination of the reasoning in *Humble Oil* and *Humble Pipe* shows that the court was holding that payments or reimbursements for indirect moving expenses of existing employees were not remuneration for services performed.

We refer to our *Humble Pipe* decision and we quote:

> Furthermore, the transfer of employees from Shreveport to Houston was the result of a business decision by the plaintiff (or its parent corporation) that the corporate interests of the plaintiff would be served to better advantage by transferring its headquarters office from Shreveport to Houston. The employees who moved from Shreveport to Houston did so because the plain-

tiff, for its own business purposes, was transferring their jobs to Houston, and they went along at the plaintiff's request in order to continue doing the plaintiff's work. Thus, the amounts which the plaintiff expended in defraying the moving costs of its employees were, "from plaintiff's point of view as an employer, expenditures incurred to advance its own wholly legitimate and bona fide business purposes." *Peoples Life Insurance Co.* v. *United States*, 179 Ct. Cl. 318, 327, 373 F. 2d 924, 929 (1967). It follows that, in paying out amounts to defray its employees' moving costs, the plaintiff was not compensating or otherwise rewarding the employees for services rendered by them. [194 Ct. Cl. at 951, 442 F. 2d at 1356–57.]

Nowhere in *Humble Oil* did we hold differently. We held:

> * * * one must look beyond *Ritter* for the solution of the present problem. In my view, the correct answer is found in the cases of *Peoples Life Insurance Company* v. *United States*, 179 Ct. Cl. 318, 373 F. 2d 924 (1967); *England* v. *United States*, 345 F. 2d 414 (7th Cir., 1965), *cert. denied* 382 U.S. 986 (1966); and *Acacia Mutual Life Insurance Co.* v. *United States*, 272 F. Supp. 188 (D. Md., 1967). [194 Ct. Cl. at 927, 442 F. 2d at 1366.]

Peoples Life Insurance Co. v. *United States*, 179 Ct. Cl. 318, 373 F. 2d 924 (1967), and *Acacia Mutual Life Insurance Co.* v. *United States*, 272 F. Supp. 188 (D. Md. 1967), held that the payment of employees' convention expenses did not constitute wages subject to withholding. This court went on to say:

> Both *Peoples Life* and *Acacia Mutual* clearly indicate that, in contrast to the question of whether payment of moving expenses constitutes taxable income to an individual employee, where the withholding statute is involved, the matter should be viewed from the standpoint of the employer's purpose in making the payments. The record in this case is clear that Humble's payments of its employees' moving expenses were properly chargeable as ordinary and necessary expenses incurred in its trade or business and were not meant by Humble to be in any sense compensation "for services performed." [194 Ct. Cl. at 929, 442 F. 2d at 1367.]

In *England* v. *United States*, 345 F. 2d 414 (7th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966), the Seventh Circuit stated "* * * the fact that the reimbursement received by

England might not fall within item (1) 'compensation for services, including fees, commissions, and similar items' is not in any way controlling." [At 416.] That court held that an employee received taxable income upon reimbursement of his moving expenses. This court concluded its discussion of the above cases with the following:

> * * * Properly considered, it would seem that "compensation for services" involves a direct exchange of services performed by the employee in return for salary, bonus, and similar items. I cannot see that the moving expense payments here involved were intended to compensate the recipient-employee for services. Instead, they were incurred by Humble in the course of its ordinary business activities and to prevent its moving employees from suffering a loss. No doubt the offer to reimburse the employees was also an inducement to them to make the requested move. Without it, probably only highly paid employees would have agreed to move in order to keep their jobs. However, there is no apparent correlation between such an inducement payment and the performance of services, and it must be for the latter before withholding thereon is required. [194 Ct. Cl. at 930, 442 F. 2d at 1368.]

Defendant argues that since Section 3401(a)(15) excepted direct moving expenses from withholding, that by inference indirect expenses are subject to withholding. We disagree, such an inference should not be made. The Court in *United States* v. *Merriam*, 263 U.S. 179, 187–88 (1923), stated:

> * * * But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. *Gould v. Gould*, 245 U.S. 151, 153. * * *

And in *Smietanka* v. *First Trust & Savings Bank*, 257 U.S. 602, 606 (1922), the Court said in discussing part of a revenue act: "The provisions of such acts are not to be extended by implication. *Treat* v. *White*, 181 U.S. 264, 267; *United States* v. *Field*, 255 U.S. 257; *Gould* v. *Gould*, 245 U.S. 151, 153." In *Gould* v. *Gould*, 245 U.S. 151, 153 (1917), the Court stated:

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Opinion of the Court

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen. *United States* v. *Wigglesworth*, 2 Story, 369; *American Net & Twine Co.* v. *Worthington*, 141 U.S. 468, 474, *Benziger* v. *United States*, 192 U.S. 38, 55.

Since the *Humble* cases there have been two circuit cases on withholding, both holding for the taxpayers. *Stubbs, Overbeck & Associates, Inc.* v. *United States*, 445 F. 2d 1142 (5th Cir. 1971), held that per diem payments to employees located at a remote jobsite were not wages subject to withholding. Judge Skelton of this court, sitting by designation, wrote the opinion. There was a revenue ruling which required withholding under the circumstances, Rev. Rul. 59–371, 1959–2 Cum. Bull. 236. The court stated that a ruling "may be helpful in interpreting a statute, but it is not binding on the Secretary or the courts. It does not have the effect of a regulation or a Treasury Decision." [At 1147.] The Supreme Court stated the same proposition in *Helvering* v. *New York Trust Co.*, 292 U.S. 455, 468 (1934):

> The rulings * * * cited by the Commissioner * * * "have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law."

In *Biddle* v. *Commissioner*, 302 U.S. 573, 582 (1938), the Court said "* * * departmental rulings not promulgated by the Secretary are of little aid in interpreting a tax statute, *Helvering* v. *New York Trust Co.*, 292 U.S. 455, 467–468, * * *."

In commenting on the *Humble* cases, the Fifth Circuit in *Stubbs, Overbeck & Associates, Inc.* v. *United States*, *supra*, stated at 1150:

> In the *Humble Pipe Line Co.* case, the court pointed out that its employees were paid different wages depending on their individual skills and abilities and the value of their services to the company, but the moving costs

of a particular employee were not in any way related to the value of his services to the company. The amount of his moving costs were fixed by other factors, such as size of his family, amount of furnishings to be moved and other items. This is similar to the situation in the case before us, where the same living allowance was paid to all Houston employees at Bartlesville regardless of their wage rate or the value of their services to the plaintiff.

In the *Humble Oil & Refining Co.* case, the court said with approval that in both the *Peoples Life Ins. Co.* and *Acacia Mutual* cases, the courts had indicated that "where the withholding statute is involved, the matter should be viewed from the standpoint of the employer's purpose in making the payments." The court then pointed out that Humble's payments of its employees' moving expenses were ordinary and necessary business expenses and were not intended by Humble to be compensation for services performed. We think this is analogous to the situation in the case before us. * * *

In *Royster Co.* v. *United States*, 479 F. 2d 387 (4th Cir. 1973), the court held that payments to salesmen to reimburse them for the cost of meals eaten in the sales territory were not subject to withholding since they were not attributable to any service on the part of the salesmen. A salesman was reimbursed regardless of his performance and performed no services while eating. He was not even on call.

We hold that the payments were not compensation for services based on the *Humble* cases, *Peoples Life Insurance Co.* v. *United States*, *supra; Acacia Mutual Life Insurance Co.* v. *United States*, *supra; Stubbs, Overbeck & Associates, Inc.* v. *United States*, *supra;* and *Royster Co.* v. *United States*, *supra.*

CONCLUSION

For the reasons above stated, we hold that the payments involved were not wages within the meaning of the withholding provisions and, therefore, plaintiff's motion for summary judgment is granted and defendant's motion for summary judgment is denied. Therefore, judgment is en-

Syllabus

tered for plaintiff with the amount of recovery to be determined pursuant to Rule 131(c).

In accordance with the opinion of the court, a memorandum report of the trial judge and a stipulation of the parties as to the amount due thereunder, it was ordered on April 23, 1976 that judgment for plaintiff be entered for $579,324.23.

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530 F. 2d 1379

STATE BANK OF ALBANY v. THE UNITED STATES

[No. 212–72. Decided February 18, 1976]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Taxes; income tax; bad debt deductions; addition to reserve for bad debts; Mimeograph 6209; "Government insured loans."—Plaintiff, a trust company organized and existing under the laws of the State of New York, seeks refund of Federal income taxes, plus assessed interest, for calendar years 1961 and 1963. Plaintiff computes its bad debt deductions on the reserve method, for which an appropriate election was made in its 1947 income tax return pursuant to Mim. 6209. For 1961 the Internal Revenue Service disallowed the inclusion in the loan base for plaintiff's calculation of the allowable addition to the bad debt reserve certain short-term notes of New York State, and assessed an additional tax, including interest, which plaintiff paid. For 1963, plaintiff did not include certain short-term notes of New York State in its loan base for calculation of the allowable addition to the bad debt reserve, but subsequently filed a claim for refund, the claim being disallowed. Plaintiff contends that the notes are not "Government insured loans" under Mim. 6209. Defendant relies on Rev. Rul. 68–630 and contends that Mim. 6209 exclusion of "Government insured loans" encompasses state notes. It is *held* that Rev. Rul. 68–630 does not, by its own language, apply to plaintiff's taxable years 1961 and 1963, that "Government insured loans" as used in Mim. 6209 applied to Federal Government loans only, and that plaintiff shou'd have been allowed to include the short-term notes of New York State in its loan base for calculating the allowable addition to its reserve for bad debts for said taxable years. Plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. Plaintiff is entitled to recover $151,021.73, plus interest, less certain offset, for year 1961, and $417,845.86, plus interest, for year 1963.

Syllabus

Taxes; Revenue Rulings and mimeographs; binding effect of.

[1] Mimeograph 6209 issued by the Internal Revenue Service, while not having the force and effect of law or regulation, is a rule of general application binding on the Commissioner and the taxpayer. The promulgation of Mim. 6209 authorizing banks, including trust companies, to use at their election a formula to determine a reasonable addition to a reserve for bad debts and the financial institution's timely election to follow it brings into effect something analogous to a binding contract.

Internal Revenue ⇐ 1202

Taxes; income tax; deductions; bad debts; addition to reserve for bad debts; retroactivity of Revenue Ruling.

[2] Revenue Rul. 68-630 issued in 1968 to clarify eligibility of certain items for inclusion in the loan base by banks, should not be applied retroactively to plaintiff-taxpayer's taxable years 1961 and 1963 where the ruling, by its own language, does not apply to problems of loan base arising in those particular tax years and where to change the meaning of "Government" recited in Mim. 6209 as excluding State governments and political subdivisions thereof from the loan base would vary the agreement between the Internal Revenue Service and taxpayer as to what the latter elected pursuant to Mim. 6209.

Internal Revenue ⇐ 1202

Taxes; Revenue Rulings and mimeographs; binding effect of.

[3] A Revenue Ruling is merely the opinion of a lawyer in the agency and must be accepted as such. It may be helpful in interpreting a statute, but it is not binding on the courts.

Internal Revenue ⇐ 1202

Taxes; Revenue laws; construction and operation; ordinary meaning of terms; "Government insured loans."

[4] As a general rule, words in a statute are to be given their usual, natural, plain, ordinary and commonly understood meaning; this rule applies with equal force to an Internal Revenue Service Mimeograph. Where plaintiff-taxpayer elected to use Mim. 6209 to determine a reasonable addition to its reserve for bad debts and did not have at the time of election the guidance of Rev. Rul. 68-630 defining the various instrumentalities embraced in the term "Government," its interpretation of "Government insured loans" to mean Federal Government was a reasonable reading of the Mimeograph.

Internal Revenue ⇐ 1202
Statutes ⇐ 188

Taxes; income tax; deductions; bad debts; addition to reserve for bad debts; mimeograph; interpretation; ambiguity.

[5] The rule of *contra proferentem* in interpretation of contract language is applicable by analogy to Mimeograph 6209 drafted by

the Internal Revenue Service, since it prescribes an accounting procedure for elective adhesion only. Where a term or statement without clarifying language in a contract of adhesion is susceptible of more than one reasonable interpretation, any ambiguity therein must be resolved against the drafter.

Internal Revenue ⇐ 1202

Contracts ⇐ 143(2)

Richard A. Langer, for plaintiff. *Earl H. Gallup, Jr.*, attorney of record.

Kenneth R. Boiarsky, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser* and *Donald H. Olson*, of counsel.

Before DURFEE, *Senior Judge*, NICHOLS and KASHIWA, *Judges*.

NICHOLS, *Judge*, delivered the opinion of the court:

Plaintiff, State Bank of Albany, brings this action to recover Federal income taxes of $151,021.73 and $417,845.86, for the years 1961 and 1963, respectively, plus statutory interest. In its original petition, plaintiff sought to recover $188,503.77 plus interest, representing Federal income taxes paid for 1962; however, in reply to defendant's cross motion for summary judgment, plaintiff conceded that it is barred from relitigating the taxable year 1962 and we do not now consider that issue. We have jurisdiction pursuant to 28 U.S.C. § 1491. We hold for the plaintiff for the reasons discussed below. The disputed issue is the meaning of the word "Government" in a Treasury pronouncement. The material facts have been jointly stipulated.

I.

Plaintiff, State Bank of Albany, is a trust company organized and existing under the laws of the State of New York. Plaintiff files its Federal income tax returns using the calendar year reporting period and the accrual method of accounting. It computes its bad debt deductions on the reserve

method, for which an appropriate election was made in its 1947 income tax return in accordance with Mim. 6209, 1947–2 Cum. Bull. 26 (hereinafter referred to as Mim. 6209).

Plaintiff timely filed its corporate income tax return for the year 1961. Following an examination, the Internal Revenue Service (IRS) disallowed the inclusion in the loan base (that is, the total outstanding loans less loans which are excluded therefrom for purposes of computing the bad debt reserve) for calculation of the allowable addition to the reserve for bad debts, of $11,001,000 worth of certain short term notes of the State of New York. The IRS assessed additional taxes in the amount of $166,723.81 which plaintiff paid, plus interest, on April 1, 1964. Plaintiff filed a claim for refund of $151,021.73 on March 29, 1966, which was formally disallowed on May 27, 1970.

On March 18, 1964, plaintiff timely filed its income tax return for 1963. Plaintiff did not include certain short term notes of New York State in the loan base for calculation of the allowable addition to the bad debt reserve; however, on March 15, 1967, plaintiff filed a claim for a $417,845.86 refund asserting the propriety of the inclusion thereof of these notes. Plaintiff's claim was formally disallowed on May 27, 1970.

The notes involved in this case are of three types:

Type	
A	State Guaranteed Bond Anticipation Notes of the New York Job Development Authority
B	State of New York Housing Bond Anticipation Notes
C	State of New York Tax Anticipation Notes

Type A notes are fully and unconditionally guaranteed by New York State, both as to principal and interest. Types B and C are direct obligations on New York State with the full faith and credit of the State pledged as to both principal and interest. None of the notes were guaranteed by the Federal Government.

The following schedule summarizes (according to type, interest rate, issuance date, maturity date, and amount) the

short-term notes of New York State held by plaintiff at the end of the 1961 and 1963 years in issue:

Type	*Interest Rate (%)*	*Issuance Date*	*Maturity Date*	*Amount*
1961				
B	1.75	1/ 9/61	1/ 9/62	$603,000
B	1.60	2/13/61	2/13/62	3,000,000
B	1.60	7/14/61	7/13/62	1,300,000
B	1.625	8/11/61	8/10/62	2,951,000
B	1.625	8/18/61	8/17/62	847,000
C	1.60	9/15/61	3/15/62	2,300,000
			Total	$11,001,000
1963				
A	1.625	1/17/63	1/17/64	1,500,000
A	2.00	11/18/63	11/18/64	1,500,000
B	1.75	7/15/63	3/ 2/64	32,000
B	1.60	3/15/63	3/13/64	751,000
B	1.625	6/14/63	6/12/64	11,292,000
B	1.75	7/12/63	7/10/64	5,958,000
B	1.95	9/13/63	9/11/64	705,000
B	1.95	9/13/63	9/11/64	1,619,000
B	2.00	11/15/63	11/13/64	1,800,000
C	1.85	8/ 1/63	3/31/64	8,600,000
C	1.70	4/15/63	3/31/64	20,000,000
			Total	$53,757,000

II.

The issue before this court is whether the short term notes described above should be included in plaintiff's loan base for purposes of computing its bad debt deduction under the reserve method. Essentially, the question is whether the short term notes are "Government insured loans" as contemplated by Mim. 6209. If so, plaintiff cannot include them in its loan base.

The starting point in analyzing the problem is the statute. Section 166(a) of the Internal Revenue Code of 1954, 26 U.S.C. Sec. 166(a), allows a deduction for debts which have become worthless during the taxable year. In lieu of any deduction under Sec. 166(a), a taxpayer may utilize Sec. 166(c) pertinent here, which provides:

> * * * there shall be allowed (in the discretion of the Secretary or his delegate) a deduction for a reasonable addition to a reserve for bad debts.

In 1947, the IRS published Mim. 6209. It is well established that Mim. 6209 is the Commissioner's exercise of dis-

cretion authorized by Sec. 166(c). While it does not have the force and effect of law or regulation, it is a rule of general application binding on the Commissioner and the taxpayer. *North Carolina Nat'l Bank* v. *United States*, 170 Ct. Cl. 765, 345 F. 2d 544 (1965). As decided in that case, the promulgation of Mim. 6209 and a taxpayer's timely election to follow it brings into effect something analogous to a binding contract. Mim. 6209 contained a formula to be used by banks, including trust companies, at their election, to determine a reasonable addition to the reserve for bad debts. Paragraph 4 of Mim. 6209 says:

> In computing the moving average percentage of actual bad debt losses to loans, the average should be computed on loans comparable in their nature and risk involved to those outstanding at the close of the current taxable year involved. *Government insured loans* should be eliminated from prior year accounts in computing percentages of past losses, also from the current year loans in computing allowable deductions for additions to the reserve. * * * (Emphasis supplied).

Mim. 6209 does not define the phrase "Government insured loans."

Rev. Rul. 54–148, 1954–1 Cum. Bull. 60, supplemented Mim. 6209 by allowing a bank a reasonable addition to its reserve for bad debts using an average experience factor based on any 20 consecutive years of experience after 1927, in lieu of a moving average experience factor determined on a basis of 20 years including the taxable year. Although the ruling specifically states that the provisions of Mim. 6209 have been carefully re-examined, (Sec. 2), it does not provide any explanation of the phrase "Government insured loans." Rev. Rul. 65–92, 1965–1 Cum. Bull. 112, superseded Mim. 6209 and Rev. Rul. 54–148 for tax years ending after December 31, 1964, and admittedly is not applicable herein.

Plaintiff contends that the notes in question are not "Government insured loans" under Mim. 6209. Plaintiff urges us to interpret "Government" in its "everyday ordinary sense," that is, according to plaintiff, meaning Federal Government and not state or local government. Defendant, however, relying on Rev. Rul. 68–630, 1968–2 Cum. Bull. 84, contends that

the Mim. 6209 exclusion of "Government insured loans" encompasses state notes.

Rev. Rul. 68–630 was issued in 1968 to clarify certain questions regarding the eligibility of items for inclusion in the loan base by banks. Section 6 defines "Government" as referring to the Federal Government and its instrumentalities, the District of Columbia, United States territories and possessions and State governments and political subdivisions thereof. Defendant says that the issue is whether the Commissioner's exercise of discretion in Rev. Rul. 68–630 was reasonable. This does not reach the real question, that is, whether the notes are "Government insured" *under Mim. 6209*. Rev. Rul. 68–630 should not be applied retroactively to the taxable years 1961 and 1963. Although Section 10 of the ruling says that the Ruling should "normally be applied to all open taxable years," Section 6 specifically interprets "Government" as it is used in Revenue Rulings 65–92; 58–259, 1958–1 Cum. Bull. 116; 57–509, 1957–2 Cum. Bull. 145; 57–210, 1957–1 Cum. Bull. 94. The only Ruling among these related to the problem is Rev. Rul. 65–92 which *superseded* Mim. 6209 for taxable years ending after December 31, 1964. Thus the Revenue Ruling does not, by its own language, apply to plaintiff's taxable years 1961 and 1963. Defendant, moreover, cannot by Revenue Ruling retroactively change the meaning of a term used much earlier in Mim. 6209 and thereby vary its agreement with the taxpayer.

Judge Skelton of this court, sitting by designation with the Fifth Circuit, made short work of a Revenue Ruling he deemed unreasonable in *Stubbs Overbeck & Assoc.* v. *United States*, 445 F. 2d 1142, 1146–47 (1971), observing:

> * * * A ruling is merely the opinion of a lawyer in the agency and must be accepted as such. It may be helpful in interpreting a statute, but it is not binding on * * * the courts. * * *

There is not any explicit legislative or regulatory gloss which will aid us in defining "Government" as used in Mim. 6209. As a general rule, words in a statute are to be given their usual, natural, plain ordinary and commonly understood meaning. *Crane* v. *Commissioner*, 331 U.S. 1 (1947); *Old Colony R.R. Co.* v. *Commissioner*, 284 U.S. 552 (1932).

See also, 82 C.J.S. *Statutes* Sec. 329(b) (1953). This rule of interpretation should be applied with equal force to Mim. 6209. As the Supreme Court said in *Lynch* v. *Alworth Stephans Co.*, 267 U.S. 364, 370 (1925): "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense. * * *" Plaintiff in 1961 and 1963 did not have the guidance of Rev. Rul. 68–630. It elected to use Mim. 6209 and interpreted "Government insured loans" in a sense that seemed rational to it.

Some of us may deplore the way the Government at Washington is, in the semantics of many, all in all, and those in Albany and other state capitols, mere puppets. But we cannot ignore common speech in construing our laws. In Webster's Third New International Dictionary, Unabridged, one of the meanings stated for Government is as follows: "8 * * * b. usu cap the executive branch of the U.S. federal government, including the political officials and usu the permanent civil service." By the same authority, a Government security is an issuance by the Federal Government. In *North Carolina Nat'l Bank*, *supra*, at 776, we used "Government" in midsentence with a capital "G" to refer to the involved exclusion in Mim. 6209. Unfortunately, the use of the initial capital, referred to by Webster as denoting Federal Government, is here not helpful as in Mim. 6209 "Government" is the first word of a sentence. However, for what it is worth, we note that *The Wall Street Journal*, December 16, 1975 at page 35, lists the following under the caption of: "Government Securities": Treasury Bonds and Notes; U.S. Treasury Bills; Federal Home Loan Bank; World Bank Bonds; Bank for Co-ops; Inter-American Development Bank; GNMA Issues; Postal Service; FNMA Issues; Federal Land Bank; and FIC Bank Debentures. All of the above are United States Government securities; there is no mention made of any state or municipal bonds or notes, a further indication that a commonly understood interpretation of "Government" in the business community at least, would be "Federal Government." Mim. 6209 applied to Federal tax returns and was administered by a Federal agency. An IRS draftsman might well overlook that other governments existed.

By analogy, a rule of contract interpretation will also aid us in reaching our result. Where a provision in a contract is susceptible of more than one reasonable interpretation, the rule of *contra proferentem* dictates that any ambiguity in the contract must be resolved against the drafter of the contract. *Kenneth Reed Const. Corp.* v. *United States*, 201 Ct. Cl. 282, 475 F. 2d 583 (1973); *Chris Berg, Inc.* v. *United States*, 197 Ct. Cl. 503, 455 F. 2d 1037 (1972). Mim. 6209 was drafted by the IRS, to be used only at a taxpayer's election, and its effect is as stated above. The analogy of such a pronouncement to a contract of adhesion is much closer than would be the case with any IRS statement meant to be otherwise used. In 1961, plaintiff's interpretation of "Government insured loans" to mean Federal Government was a reasonable reading of the Mimeo. Defendant's use of the phrase, without any clarifying language by 1961, created what was at best for it an ambiguity which should be construed against the drafter.

Defendant urges that the Commissioner's decision to exclude New York State short-term notes from the loan base was reasonable since these notes involve "no reasonable risk of loss." Even though being reasonable, he could not vary his agreement. *North Carolina Nat'l Bank*, *supra*. Plaintiff further refutes this argument in distinguishing between loans insured or guaranteed by the United States Government and those insured or guaranteed by state or local governments. Loans insured or guaranteed by the United States Government are backed by the full faith and credit of the Federal Government. When the Federal Government finds its debt obligations onerous, it can manage them by managing the currency. States cannot do this. Federal loans cannot go bad unless the country collapses and therefore it would not be reasonable to establish a bad debt reserve for them for Federal tax purposes. Mim. 6209's exclusion of "Government insured loans" was therefore sensibly designed so as to exclude United States Government insured loans from the loan base. The difference respecting state obligations is one of kind as well as degree. State and local bonds do not have the same degree of certainty. There is a varying element of risk associated with these bonds which cannot be

overlooked. The IRS Commissioner could not in 1947 or any other time have certified that they were all free from risk. To assume that investors would consider all governmental notes, Federal, state or local, of equal risk or absence of risk is to ignore the realities of the financial world. Defendant's argument is without merit.

In conclusion, the court determines that "Government insured loans" as used in Mim. 6209 applied to Federal Government loans only. Plaintiff should have been allowed to include the short-term notes at issue in its loan base for calculating the allowable addition to its reserve for bad debts for the taxable years 1961 and 1963. Accordingly, plaintiff's motion for summary judgment is granted and defendant's cross motion for summary judgment is denied. Plaintiff is entitled to recover $151,021.73 plus interest, less an offset in the amount of $1,128.59 in tax and $57.91 in interest (which amounts, according to the parties stipulations, were erroneously refunded to plaintiff on February 17, 1965) for the taxable year 1961, and $417,845.86 plus interest for the taxable year 1963.

DURFEE, *Senior Judge*, dissenting:

I agree that the real question is not whether the Commissioner's exercise of discretion in Rev. Rul. 68-630 issued in 1968 was reasonable, and that it should not be applied retroactively to the taxable years 1961 and 1963. However, to say that "the real question * * * is, whether the notes are 'Government insured' *under Mim. 6209*" does not thereby eliminate our required standard of review in section 166 bad debt reserve cases as stated in *Kirtz* v. *United States*, 157 Ct. Cl. 824, 832, 304 F. 2d 460, 464 (1962):

> Since by the terms of the statute the taxpayer is allowed to deduct its actual bad debts as a matter of right, but an addition to a reserve for estimated bad debts "in the discretion of the Secretary or his delegate" *the issue is whether the exercise of discretion by the Commissioner of Internal Revenue was reasonable.* * * * [Emphasis added].

Even accepting as reasonable plaintiff's interpretation of the term "Government insured loans" to mean Federal

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Government loans is not enough to entitle plaintiff to prevail in this case.

> * * * It does not follow that if the plaintiff was reasonable in its determination the defendant was unreasonable. The burden is on the plaintiff to show that the Commissioner was unreasonable, and absent this showing we will not assume that there has been an abuse of discretion. * * * *Kirtz* v. *United States*, *supra*, 157 Ct. Cl. at 832, 304 F. 2d at 464.

I can find nothing to show that the Commissioner abused his discretion in applying the prohibition against the inclusion of "Government insured loans" in a taxpayer's loan base to plaintiff's inclusion of its 1961 and 1963 New York State loans in its loan base in those years for computation of its bad debt reserve deduction.

Plaintiff has produced no evidence showing any history of loan default on the part of New York State or its agencies, or that such loans contained any greater element of risk than Federal loans.

Unconvinced that the Commissioner abused his discretion in this case, I would grant defendant's cross-motion for summary judgment.

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530 F. 2d 930

THE AMERICAN COLLEGE OF PHYSICIANS v. THE UNITED STATES

[No. 100–74. Decided February 18, 1976]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Taxes; income tax; exempt organizations; unrelated trade or business.—Plaintiff, an exempt organization under Sec. 501(c)(3) of the Internal Revenue Code of 1954, seeks refund of Federal income taxes, plus statutory interest. In compliance with newly adopted regulations, effective December 13, 1967, plaintiff paid an income tax for calendar years 1968 and 1969 on income from advertising in its publication, *The Annals of Internal Medicine*, which is composed of both editorial and advertising material. Plaintiff filed timely claim for refund for those years and, absent action on the claim, filed this suit. It is *held* that Treas. Regs. Sec. 1.513–1(b) and (d)(4)(iv), examples 6 and 7, insofar as they subject to tax,

as unrelated business income, the advertising profits of plaintiff's journal, impermissibly enlarge the scope of Secs. 511 through 513 of the Internal Revenue Code of 1954, and contravene congressional intent, by fragmenting plaintiff's integrated enterprise into its constituent profit-making and non-profit activities. Plaintiff is entitled to refund of taxes paid, plus interest. Plaintiff's motion for summary judgment is granted, defendant's cross-motion is denied, and judgment is entered for plaintiff for $376,976.86, plus interest thereon as provided by law.

Statutes; construction and operation; legislative intent; subsequent Congress, opinion expressed by.

[1] The views of the 1969 Congress as to the meaning of the 1950 statute imposing a tax at corporate rates on the unrelated business income of an organization otherwise exempt from tax and of the validity of the 1967 regulations promulgated pursuant thereto, are entitled to little, if any, weight.

Statutes ⟸ 220

Taxes; income tax; exemption from taxation; educational, etc. organizations; unrelated trade or business.

[2] The court adopts the reasoning and result of *Massachusetts Medical Soc.* v. *United States*, 514 F. 2d 153 (1st Cir. 1975), which, as defendant concedes, is factually indistinguishable from the instant case.

Internal Revenue ⟸ 837

John B. Huffaker, attorney of record, for plaintiff. *Charles R. Pascoe*, *John J. Runzer*, and *Pepper, Hamilton & Scheetz*, of counsel.

Scott P. Crampton, *Assistant Attorney General*, for defendant. *Theodore D. Peyser*, *Donald H. Olson*, and *Richard D. Silvester*, of counsel.

Before COWEN, *Chief Judge*, DAVIS and KASHIWA, *Judges*

COWEN, *Chief Judge*, delivered the opinion of the court:

This case concerns the validity of Treasury Regulations Section 1.513–1(b) and (d)(4)(iv), examples 6 and 7 promulgated in 1967 pursuant to Sections 511 through 513 of the Internal Revenue Code of 1954,[1] insofar as they subject to tax, as unrelated business income, the advertising

[1] Unless otherwise noted, all references hereinafter to the Code are to the Internal Revenue Code of 1954, and to applicable provisions in force in 1968 and 1969.

profits of an exempt organization's journal.[2] Plaintiff, the American College of Physicians, seeks a refund of $376,976.86, plus interest, in Federal income taxes paid for the calendar years 1968 and 1969.

The College, a Delaware corporation organized in 1915 and classified by the Internal Revenue Service as an exempt organization under Section 501(c)(3) of the Code, is a medical society comprised of physicians primarily specializing in internal medicine. The activities of the taxpayer include post-graduate seminars and courses on topics of interest to physicians, funding of research fellowships, holding of regional and national conventions to discuss current medical topics, and the publication of *The Annals of Internal Medicine*. The *Annals* is a highly regarded medical journal, widely read by members of the medical profession and considered by many to be the outstanding journal in the field of internal medicine. The publication of the *Annals* is an enterprise which admittedly is substantially related to the tax-exempt purposes for which the plaintiff was organized. In fact, the President and the Executive Vice President of the College regard the *Annals* as the most important component of plaintiff's educational program.

The *Annals* is composed of both editorial and advertising material. The advertising is strictly limited to products (largely pharmaceuticals) pertaining to internal medicine.

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[2] As originally enacted under the Revenue Act of 1950, ch. 994, §§ 301, 331, 64 Stat. 947, 957, and as reenacted under the 1954 Code, Section 511(a)(1) imposed a tax at corporate rates on the "unrelated business taxable income" of all organizations otherwise exempt from tax under Section 501. Section 512 defined "unrelated business taxable income" as the income of an exempt organization derived from any unrelated trade or business regularly carried on by it. Section 513(a) defined "unrelated trade or business," in pertinent part, as "any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501. * * *"

In 1969, Congress prospectively amended these sections, Pub. L. No. 91-172, 83 Stat. 536, to validate the 1967 regulations here at issue. Accordingly, our decision is of effect only for the period between promulgation of the 1967 regulations, effective December 13, 1967, and enactment of the statutory amendments, effective December 31, 1969. As the Government concedes, however, the views of the 1969 Congress as to the meaning of the statute enacted in 1950 and the validity of the 1967 regulations promulgated pursuant thereto, are entitled to little, if any, weight. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968).

During the years in suit, plaintiff's income from advertising in the *Annals* accounted for $1,820,392 of plaintiff's total income of $4,642,777 from all sources. The advertising functions of the *Annals* are conducted separately from its editorial functions. The advertising screening committee is composed of the Executive Vice President of the College and three internists. The advertising staff is compensated on a salary basis. The advertising and editorial sections are prepared and sent to the printer independently of each other.

The character and extent of the advertising screening process, as well as the educational value of the advertisements, are in dispute.[3] The *Annals* regularly competes for advertising income with commercially published medical journals which, because of their non-exempt status, must in some instances charge higher rates than the plaintiff.

In compliance with the 1967 regulations, plaintiff for the first time paid an income tax on its advertising income for the years 1968 and 1969. Plaintiff filed a timely claim for refund for those years and, after more than 6 months had elapsed without action on the claim, this suit was filed. The question presented for decision is whether plaintiff's net income from advertising in its medical journal for the years 1968 and 1969 is taxable as the income of an unrelated trade or business within the meaning of Sections 511 through 513 of the Code. As the case is presented to us, the resolution of this question rests upon a determination of whether Treasury Regulations, Section 1.513–1(b) and (d)(4)(iv), examples 6 and 7, constitute an invalid interpretation of the statute pursuant to which they were promulgated.

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[3] Plaintiff has submitted affidavits by internists which suggest that the journal's advertisements have substantial educational value and, indeed, constitute an "abbreviated medical textbook article on the specific drug." *Plaintiff's Motion for Summary Judgment*, Sadusk Affidavit, at para. 8. Defendant, however, offers contrary evidence to the effect that the advertisements, albeit accurate and not misleading (pursuant to FDA standards), fail to offer comparative cost and qualitative data vis-a-vis competing drugs, are not necessarily up-to-date or indicative of recent developments in the field, and would in no case provide sufficient basis for a physician's use or prescription thereof. *Defendant's Cross Motion for Summary Judgment*, at 7–12. Since we view as dispositive the issue of whether plaintiff's advertising activities, as a matter of law, constituted a "trade or business" for tax purposes—irrespective of whether the advertisements themselves are or are not substantively related to plaintiff's exempt purpose—we find it unnecessary to resolve this essentially factual dispute.

The 1967 regulations define a "trade or business" as any income-producing activity, and plaintiff contends that they are invalid because they fragment the journal of an exempt organization into exempt editorial and non-exempt advertising "activities" for the purpose of the unrelated business income tax. In illustrating the type of activity which is taxable as unrelated business income, the regulations provide in part, at Section 1.513–1(b):

> [A]ctivities of soliciting, selling, and publishing commercial advertising do not lose identity as trade or business even though the advertising is published in an exempt organization periodical which contains editorial matter related to the exempt purposes of the organization.

If the regulations are valid, as defendant contends, then the advertising activities of plaintiff's journal may properly be treated as an unrelated trade or business and the income therefrom taxed accordingly. If invalid, as plaintiff contends, then the journal's advertising and editorial activities should be treated as inseparable parts of a single, integrated enterprise, all income of which is wholly exempt from Federal income tax.[4] Since we find that the regulations at issue impermissibly enlarge the scope of the applicable statute, we conclude that plaintiff is entitled to a refund of taxes paid, plus interest, on its advertising income for the years 1968 and 1969. Accordingly, we grant plaintiff's motion for summary judgment, and deny defendant's cross motion.

Relying primarily on its analysis of the legislative history of the 1950 Act, the Government makes the following arguments in support of its position:

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[4] Defendant makes the alternative argument that, should the applicable regulations be held invalid, a trial will be necessary to determine, as a factual matter, (1) whether plaintiff's advertising department operated as a separate enterprise (*e.g.*, as an independent advertising placement agency), and (2) whether the advertisements themselves are unrelated to plaintiff's exempt educational purpose. We disagree. The question of the educational value, or relatedness to plaintiff's exempt purpose, of the advertisements is, in our view, subsidiary to the issue of the proper scope to be accorded the statutory definition of "trade or business." *See* note 3 *supra*. Similarly, a factual inquiry into the character of a single and ostensibly integrated journal's advertising activities would appear unnecessary where the ultimate issue is whether a journal, as a matter of law, may properly be fragmented into separate editorial and advertising activities for tax purposes.

1. The legislative history of Sections 511 through 513 of the Code indicates that Congress intended, by means of the unrelated business income tax, to eliminate unfair competition not only by business *enterprises* operated by exempt organizations, but also by business *activities* thereof, so long as the tax exemption privilege accorded such organizations an unfair competitive advantage over their non-exempt counterparts engaged in essentially the same profit-producing activities.

2. Legislative history demonstrates that Congress intended the phrase "trade or business," as used in Section 513, to have the same broad meaning as it had under what is now Section 162, governing the deduction of business expenses and encompassing generally any offering of goods or services for profit. Such an interpretation, as expressly adopted in the 1967 regulations, comports with the broadly remedial purpose of the original statute. Moreover, plaintiff's reliance on certain narrower definitions of "trade or business" found elsewhere in the Code (*e.g.*, Sections 270, 346 and 355) is misplaced, inasmuch as the Code does not purport to offer a fixed and uniform definition of that phrase.

3. In allowing the taxpayer to offset editorial expenses against unrelated advertising income, the 1967 regulations based on Section 512(a) are consistent with the statute's basic purpose of achieving competitive parity between the profit-making enterprises of exempt and commercial organizations, since disallowance of such deductions would place exempt organizations in a competitively *less* favorable position than their commercial counterparts. Furthermore, although the editorial content of plaintiff's journal is educational and, if sold alone, would generate tax-exempt income, when that editorial content is directly exploited as the vehicle to generate unrelated advertising income, the cost of the editorial content is, functionally, "directly connected with the carrying on of [the advertising business]," as required for the deduction thereof under Section 512(a) of the Code.

These same basic contentions were made by the Government and rejected by the First Circuit in *Massachusetts Medical Society* v. *United States*, 514 F. 2d 153 (1st Cir. 1975), a case involving the taxability as unrelated business income

of profits from advertising in the *New England Journal of Medicine*. Defendant concedes that *Massachusetts Medical* is factually indistinguishable from the instant case, but challenges the correctness of that decision and urges us not to follow it here. After careful consideration, however, we agree with the First Circuit's reasoning and the result it reached in that case. Accordingly, we find it unnecessary to do more than set forth the following summary of the First Circuit's conclusions and to adopt them as the basis for our decision in this case:

1. The 1967 regulations contravene the congressional intent by fragmenting an integrated enterprise into its constituent activities. This view is in accord with the virtually unanimous opinion of commentators. The examples used in the 1950 Act to illustrate what operations would or would not be taxed contemplate integrated enterprises. There is little support in the legislative history for the regulation's flat equation of a trade or business with any activity conducted as an integral part of an exempt enterprise. The 1950 Act was a fairly limited measure, designed to distinguish the customary activities of exempt organizations from the operation of independent business enterprises entirely unrelated to the educational purpose of the organization. The publication of advertising in tax-exempt educational journals was a well-established practice before 1950, and Congress did not intend to treat such advertising on a par with an independently run advertisement placement agency.

2. Although the legislative history suggests that Congress intended the phrase "trade or business," as used in Section 513, to have the same meaning as it had in the present Section 162 (governing business expense deductions), the integrated publication of a magazine would qualify as a "trade or business." Moreover, the Government has cited no Section 162 precedent, nor can any be found, for fragmenting an operation run as an integrated whole into its component parts.[5]

[5] In its *Reply Brief*, at 5–6, defendant argues that the First Circuit's analysis of Section 162, as the legislative source for the definition of "trade or business" applicable under Section 513, squarely conflicts with *Iowa State University of Science and Technology* v. *United States*, 205 Ct. Cl. 339, 500 F.2d 508 (1974); *Adirondack League Club* v. *Commissioner*, 55 T.C. 796 (1971).

(Continued)

Also, a central determination to be made under definitions of "trade or business" found elsewhere in the Code, to which reference is also made in the legislative history, is whether a particular activity is a business in its own right or merely a part of another business (*e.g.*, Sections 270 (hobby losses), 346 and 355 (partial liquidations and spin-offs)).

3. Treasury Regulations Section 1.512(a)–1(a) and (d)(2), which permit expenses attributable to a journal's exempt editorial activities to be offset as deductions against taxable advertising income, are inconsistent with the regulations' assumption that advertising constitutes a separate, unrelated business, and with Section 512(a) of the Code, which ostensibly limits deductions to expenses "directly connected" with such unrelated business (i.e., having "a proximate and primary relationship" thereto, Treasury Regulations Section 1.512(a)–1(a)). Although the provision for such deductions was no doubt prompted by Treasury's desire to place exempt organization journals on a competitive parity with

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(Continued)

aff'd per curiam, 458 F.2d 506 (2d Cir. 1972); and *Five Lakes Outing Club* v. *United States*, 468 F.2d 443 (8th Cir. 1972). These cases, according to defendant, hold generally that a nonprofit organization cannot merge the tax consequences of profitable and nonprofit activities simply by placing them under a single corporate roof, but that such activities must be separately classified for purposes of determining which expenses are deductible under Section 162. Read in their factual contexts, however, these cases appear to us to be inapposite.

In *Iowa State*, for example, the court held that expenses of a University's two nonprofit radio stations were not deductible from the income of its profit-making television station under Section 162, inasmuch as the latter was found to constitute an unrelated business under Section 513. We fail to perceive how the reasoning or result in that case, as defendant apparently contends, mandates the fragmentation of an enterprise run as an integrated whole into its constituent profit-making and nonprofit parts. Indeed, the issue of "fragmentation" was not even presented in *Iowa State*, inasmuch as that case concerned not the relationship between the programming and advertising departments of an exempt television station, but the relationship among three entirely separate enterprises—two admittedly exempt radio stations and one non-exempt television station.

Similarly, *Adirondack League* concerned the deductibility under Section 162 of expenses incurred by a nonprofit membership corporation in the operation of its exempt recreational preserve, from income derived by that corporation through the conduct of its non-exempt timber business. Again, the treatment of the relationship between an admittedly exempt recreational preserve and an admittedly non-exempt timber business would appear to offer scant precedent for the treatment of the relationship between the advertising and editorial departments of a single, integrated journal. Nor, finally, can much support for defendant's position be derived from *Five Lakes*, which denied the deduction of a social club's losses on its recreational operations from the income it received on the rental of its adjacent land.

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their commercial counterparts (which *may* deduct all expenses, both advertising and editorial), it is doubtful that Congress, in 1950, would have approved such an anomalous result. Nor does the theory that, for purposes of the deductions, commercial organizations customarily conduct these ostensibly unrelated businesses together, support the Government's interpretation that the statute contemplated fragmenting operations likewise customarily conducted as an integrated whole.

Accordingly, IT IS ORDERED that plaintiff's motion for summary judgment is granted; defendant's cross motion for summary judgment is denied, and judgment is hereby entered in favor of the plaintiff in the sum of $376,976.86, plus interest thereon as provided by law.

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530 F. 2d 367

TONY DOWNS FOODS COMPANY v. THE UNITED STATES

[No. 358-74. Decided February 18, 1976]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Contracts; sovereign act; price freeze; supply contracts.—On June 21 and July 20, 1973, plaintiff was awarded two fixed-price contracts to supply poultry products to the Department of Agriculture during the summer of 1973. At the time of submission of bids, a freeze was in effect, pursuant to Executive Order 11723, on the price of substantially all commodities and services offered for sale, the freeze to remain in effect for an indefinite period not to exceed 60 days. Before the dates for contract performance and prior to defendant's acceptance of the July contract bid, the freeze was terminated. Plaintiff seeks to recover its excess performance costs allegedly caused by termination of the price freeze prior to performance of the contracts. It is *held* that the imposition of the price freeze and termination thereof constituted an exercise of sovereign power for which the United States cannot be held liable. It is also *held*, regarding the July contract and with respect to plaintiff's contention that termination of the freeze created an error in bid which the contracting officer failed to detect, that the mistake resulted from plaintiff's mistaken judgment as to economic conditions and continuance of the freeze for which, absent contract provision therefor, relief cannot be granted. Accordingly, plaintiff's contracts are valid and enforceable

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according to their terms. Plaintiff is not entitled to recover, defendant's motion for summary judgment is granted, plaintiff's cross-motion is denied, and the petition is dismissed.

Contracts; sovereign act; effect of on rights and liabilities of parties.

[1] The United States when sued as a contractor cannot be held liable for an obstruction to performance of the particular contract resulting from its public and general acts as a sovereign. There can be no comparison between contract losses caused by an unanticipated natural disaster and additional contract performance costs occasioned by the deliberate Government imposition and/or termination of economic controls, such as a price freeze, the latter being an exercise of sovereign power.

United States ⟸ 74(3)

Contracts; formation of contracts; nature and grounds of contractual obligations.

[2] Generally, difficulty of performance or losses in carrying out a contract will not be treated as a basis for relief by the courts in the absence of a special clause in the contract providing for such relief, both parties being bound by the terms of the contract. Where an Executive Order imposing a price freeze was prior to plaintiff's contract bids and the Order specified that the price controls were temporary and of indefinite duration up to maximum of 60 days, removal of the price controls resulting in losses to plaintiff in performance of its fixed-price supply contracts cannot legitimately be viewed as unforeseeable or beyond reasonable anticipation, especially at a time when the Government was actively utilizing a variety of measures to produce economic stability.

United States ⟸ 70(23)

Contracts; bids; mistake.

[3] For a Government contractor to recover on the ground of error in bid, it must show that the contracting officer overreached the contractor by accepting its bid although the contracting officer knew or should have known of the mistake at the time of acceptance. A contractor's burden in making the showing is to adduce factors which under the facts and circumstances of the particular case should reasonably have raised the presumption of error in the mind of the contracting officer.

United States ⟸ 70(29)

Contracts; bids; mistake.

[4] Legally, for a contractor to recover because of bid mistake, there must be a discrepancy between the contractor's state of mind and his offer. Where a contractor's losses on its fixed-price Government contract resulted from termination of a price freeze, the losses were not the product of a difference in the contractor's state of mind and its bid, but rather of mistaken judgment as to economic conditions and the continued existence of the price freeze, a mistake for which

relief cannot be granted absent specific provision in the contract for such termination.

United States ⟸ 70(29)

Contracts; parties; Government contract.

[5] When contracting, the Government must be regarded as a private party.

United States ⟸ 63

Contracts; interpretation; intention of parties to contract.

[6] A Government contractor, regardless of its size, locality or experience, is bound to understand the complexities and consequences of its undertaking.

United States ⟸ 70(29)

Leo E. Fitzgibbons, attorney of record, for plaintiff. *John G. Martens*, *Fitzgibbons Brothers*, of counsel.

Susan M. Linden, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before DUREE, *Senior Judge*, SKELTON and BENNETT, *Judges*.

DURFEE, *Senior Judge*, delivered the opinion of the court:

In the past this court has dealt with a variety of claims involving animals, including two dogs and a cat.[1] horses,[2] geese,[3] chickens[4] and now in this case, turkeys. Plaintiff entered into two contracts to supply the United States Department of Agriculture with canned turkey and chicken parts for the Department's school lunch program. The contracts called for delivery of the poultry products at specified times at a fixed-price per pound. Plaintiff bid on the first contract (June contract)[5] on June 19, 1973 to supply defendant with 1,552,950 pounds of poultry at $.9191 per pound for a total contract price of $1,427,316.55. This bid was accepted and the contract awarded to plaintiff on June 21, 1973. Deliveries on this contract were due between August 1 and August 15, 1973. On July 16, 1973, plaintiff bid on the second contract (July contract).[6] This bid offered to supply

[1] *Pedersen* v. *United States*, 115 Ct. Cl. 335 (1950).
[2] *Pauly* v. *United States*, 152 Ct. Cl. 838 (1961).
[3] *McGuire* v. *United States*, 158 Ct. Cl. 285, 305 F. 2d 449 (1962).
[4] *Wilfong* v. *United States*, 202 Ct. Cl. 616, 480 F. 2d 1326 (1973).
[5] Contract No. 12-25-3-4685.
[6] Contract No. 12-25-4-4002.

887,400 pounds of poultry products at $.9691 per pound for a total contract price of $860,689.26. Defendant accepted this bid and awarded plaintiff the contract on July 20, 1973 with delivery due between September 2 and September 15, 1973.

At the time plaintiff computed and submitted its bids on both its June and July contracts a comprehensive price freeze was in effect on the price of all commodities and services offered for sale (with certain irrelevant exceptions). This price freeze, one of the various phases of the President's Economic Stabilization Program, was imposed by Executive Order 11723 [7] on June 13, 1973. The Executive Order imposing the price freeze provided that it would remain in effect for an indefinite period not exceeding 60 days. On July 18, 1973, before the performance date(s) of plaintiff's contracts and prior to defendant's acceptance of plaintiff's July contract bid, the price freeze was terminated by Executive Order 11730.[8]

Following the termination of the price freeze, the previously stabilized price of poultry [9] needed by plaintiff to fulfill its contract and upon which plaintiff had computed its bids rose. After the termination of the price freeze, plaintiff's cost per pound for turkey rose from $.5051 to $.6970. Plaintiff's chicken costs increased from $.3728 to $.57 per pound.

Plaintiff timely performed both of its contracts but due to the increase in poultry prices did so at an aggregate loss of $312,009.84 on the two contracts.

By letter dated August 9, 1973, plaintiff requested price relief from the Contracting Officer on account of the losses it sustained on the two contracts. The Contracting Officer denied this request because, as he advised plaintiff, he had "no authority, either under the contracts or the price stabilization program, to renegotiate contract prices." The Agriculture Board of Contract Appeals dismissed plain-

[7] 3A CFR 1973 Comp., p. 184.
[8] 3A CFR 1973 Comp., p. 197.
[9] While the price freeze imposed by Executive Order 11723 did not apply to raw agricultural products, neither party contends that plaintiff's costs of its raw materials, *e.g.*, turkey and chicken, were not subject to the price freeze. As the record demonstrates nothing to the contrary, the court accepts the parties' representations that plaintiff's raw material costs were subject to the price freeze.

tiff's timely appeals for lack of jurisdiction characterizing plaintiff's appeals as raising questions of law only.

Plaintiff brings this suit, under the Wunderlich Act (41 U.S.C. §§ 321, 322 (1970)), seeking recovery of its excess contract performance costs allegedly caused by the termination of the President's price freeze prior to plaintiff's performance of either supply contract. Defendant acknowledges plaintiff's losses in the performance of its contracts and the precipitation of those losses by the termination of the price freeze. However, in spite of these acknowledgments, defendant maintains its contractual immunity for those losses. The case comes before the court on the parties' respective motions for summary judgment, there being no dispute as to the operative facts of the controversy. For the reasons set forth below, plaintiff is not entitled to recovery, and its motion for summary judgment is denied. Defendant's summary judgment motion is granted, and plaintiff's petition dismissed.

In its petition, plaintiff divided its claim(s) into two counts. Count I deals with plaintiff's July contract and seeks recovery of excess performance costs in the amount of $209,204.55. Count II seeks recovery of $102,805.29 for losses plaintiff sustained on its June contract. For chronological purposes, plaintiff's respective counts will be treated in reverse order.

Count II—June Contract

As Count II of its petition, plaintiff seeks price relief for its excess performance costs on its June contract. Plaintiff predicates its Count II claim on the singular contention that the termination of the existing price freeze by Executive Order with the attendant increase in the cost of plaintiff's raw materials gives rise to a compensable contract claim. Plaintiff cites no contract provision in support of its position. Plaintiff's contract did not contain a price escalation clause, a changes clause nor had plaintiff secured firm price commitments from its suppliers. Rather, plaintiff seeks recovery on the sole ground that "the unilateral action of the Defendant (Executive Order 11730) made the contract burdensome, oppressive and destructive of the Plaintiff's business." Pltf's pet. p. 18, ¶ 18.

The Supreme Court has provided the short answer to this argument. "It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." *Horowitz* v. *United States*, 267 U.S. 458, 461 (1925). The Supreme Court's *Horowitz* decision specifically validated an early holding of this court that:

> "* * * The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons * * * In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendant." *Jones* v. *United States*, 1 Ct. Cl. 383, 384–385 (1865).[10]

While it is conceded that the termination of the price freeze obstructed plaintiff's contract performance and made it more costly, plaintiff does not contend that the termination of the price freeze was other than a public and general act for the general good issued in the exercise of the sovereign power of the United States. Such an argument would undoubtedly be futile.[11] Plaintiff's failure to challenge the character of the Executive Orders herein at issue renders unnecessary an extended discussion of their public and general nature or that they were unquestionably promulgated for the general good. Suffice it to say that in *McCrary* v.

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[10] 267 U.S. at 461.

[11] *See, Hallman* v. *United States*, 107 Ct. Cl. 555, 68 F. Supp. 204 (1946); *Piggly-Wiggly Corp.* v. *United States*, 112 Ct. Cl. 391, 81 F. Supp. 819 (1949); *Barnes* v. *United States*, 123 Ct. Cl. 101, 105 F. Supp. 817 (1952); *Anthony P. Miller, Inc.* v. *United States*, 161 Ct. Cl. 455, *cert. denied*, 375 U.S. 879 (1963); *Amino Brothers Co.* v. *United States*, 178 Ct. Cl. 515, 372 F. 2d, 485 *cert. denied*, 389 U.S. 846 (1967); *Glasgow Associates* v. *United States*, 203 Ct. Cl. 532, 495 F. 2d 765 (1974).

United States, 114 Ct. Cl. 12, 84 F. Supp. 368 (1949), the court found the Government immune from damages resulting to a contractor from the imposition of an Executive Order labor freeze, akin to the instant Executive Order price freeze, holding such damages to be unrecoverable as *damnum absque injuria*. *McCrary* v. *United States*, *supra*, 114 Ct. Cl. at 36, 84 F. Supp. at 371.

In its written submission to the court, plaintiff presented neither argument nor authority to refute defendant's well presented and comprehensive argument that defendant is contractually immune from liability for the sovereign acts of the United States. Besides failing to respond to the Government's defense presented in its summary judgment motion, plaintiff, in its motion for summary judgment, advanced neither argument nor authority in support of its own position.

Plaintiff's latter failing prompted defendant to ask the court to treat plaintiff's Count II claim as abandoned. At oral argument, plaintiff's counsel urged reliance on *Dillon* v. *United States*, 140 Ct. Cl. 508, 156 F. Supp. 719 (1957), as precedent for allowing plaintiff recovery on Count II of its petition. The marked differences between the *Dillon* case and the instant dispute do not readily lend themselves to valid comparison between the two cases nor provide persuasive ground for allowing plaintiff recovery.

In *Dillon* v. *United States*, *supra*, the court allowed a hay supply contractor his excess performance costs occasioned by a severe drought in the contemplated contract performance area. This case turned on a conclusive showing of the contemplated conditions incident to the hay supplier's contract performance, and the fact that the contractor's excess costs were brought about by an unforeseen natural disaster. None of these controlling circumstances are present in the instant case.

The instant case lacks any evidence as to an understanding between the parties regarding either the price stability of poultry or the continued existence of the previously imposed price freeze. The contract contained no recitals either affording plaintiff relief for increased performance costs or guaranteeing the continued existence of the price freeze.

The Executive Order imposing the price freeze, incorporated by reference into the parties' contract, specified that the price freeze would be effective for an indefinite period not exceeding 60 days. Further, the Department of Agriculture had continually advised poultry suppliers of changes affecting their contemplated methods of contract performance and consequently their costs through Announcements to the Market. Up to the time of the termination of the price freeze, the Agriculture Department had issued three such notices, each imposing additional conditions on poultry suppliers. These factors, fortified by the absence of any contrary showing by plaintiff, readily evidence the continual changes under which such suppliers operated and militates against any conclusive showing that the parties entered the contracts under a preconceived understanding of economic stability as a contemplated condition to their contracts. Such a showing is not only absent from the present case but the record rebuts any inference that continued price stability was a contemplated condition of the parties' contract.[12]

The contractor's losses in *Dillon* were brought on by an unforeseen natural disaster. There can be no comparison between contract losses caused by an unanticipated natural disaster and additional contract performance costs occasioned by the deliberate Government imposition of economic controls, the latter being an exercise of sovereign power for which the Government bears no contractual responsibility. Moreover, the removal of temporarily imposed price controls cannot legitimately be viewed as unforeseeable or beyond reasonable anticipation, especially at a time when the Government was actively utilizing a variety of measures to produce economic stability. The Executive Order imposing the price freeze, prior to plaintiff's bidding on either contract, specified that the price controls were temporary, and of indefinite duration up to a maximum of 60 days. This Executive Order further raised the flag of future changes by directing the Cost of Living Council to formulate additional economic control policies, mechanisms and procedures. In light of these circumstances, circumstances which plain-

[12] *Cf. McNamara Construction of Manitoba, Ltd.* v. *United States*, 206 Ct. Cl. 1, 509 F. 2d 1166 (1975).

tiff, as an experienced business enterprise, should have been aware of,[13] it cannot be reasonably concluded that plaintiff's losses resulted from unanticipated or unforeseeable events. Consequently, the *Dillon* decision has no application to the facts of this case. Applicable to this case, however, is the general rule stated in *Dillon* that "* * * difficulty of performance or losses in carrying out a contract will not be treated as a basis for relief by the courts in the absence of a special clause in the contract stipulations providing for such relief, both parties being bound by the terms of the contract." *Dillon* v. *United States*, *supra*, 140 Ct. Cl. at 512–513, 156 F. Supp. at 722.

The validity of defendant's immunity defense, barring its contractual liability for a contractor's losses resulting from the exercise of the Government's sovereign powers, coupled with the absence of the factors giving rise to the contractor's recovery in *Dillon*, precludes plaintiff's recovery on its Count II claim.

Count I—July Contract

Count I of plaintiff's petition seeks recovery for plaintiff's excess performance costs on its July contract. As with Count II, plaintiff's Count I claim would also be barred by defendant's immunity defense if plaintiff's July contract is valid, and plaintiff's claim for excess performance costs was based on the termination of the price freeze. Plaintiff attempts to avoid the sound defense of sovereign immunity by advancing the unique but nonetheless meritless argument that the termination of the price freeze created an error in its bid which the Contracting Officer failed to detect. Hence, plaintiff argues that the Contracting Officer wrongfully accepted plaintiff's July bid, and a valid contract was not created by the Contracting Officer's wrongful acceptance and award of the July contract to plaintiff.

The thorough and comprehensive discussion of parties' rights, obligations and remedies for bid mistakes in *Wender Presses, Inc.* v. *United States*, 170 Ct. Cl. 483, 343 F. 2d 961 (1965) provides an authoritative starting point for consideration of plaintiff's Count I claim. *Wender Presses*

[13] *Franklin Co.* v. *United States*, 180 Ct. Cl. 666, 381 F. 2d 416 (1967).

began with the observation that "* * * although an award normally results in a binding contract fixing the parties' rights and obligations (*United States* v. *Purcell Envelope Co.*, 249 U.S. 313 (1919)), so that 'ordinarily no relief will be granted to a party to an executory contract in the case of a unilateral mistake', *Saligman* v. *United States*, 56 F. Supp. 505, 507 (E.D. Pa., 1944), nevertheless an acceptance of a bid containing a palpable, inadvertent error cannot result in an enforceable contract." *Wender Presses, Inc. v. United States, supra*, 170 Ct. Cl. at 486, 343 F. 2d at 962–963. This is because "Absent mistake, if bids or modifications thereof could be withdrawn after the results of the bidding were made known 'frauds innumerable could be perpetrated against the United States.' *Scott* v. *United States*, 44 Ct. Cl. 524, 527 (1909)." *Condec Corp.* v. *United States*, 177 Ct. Cl. 958, 968, 369 F. 2d 753, 759 (1966). Thus, plaintiff to recover on its July contract must show that "* * * defendant's responsible officials knew or should have known of the mistake at the time the bid was accepted." *Wender Presses, Inc.* v. *United States, supra*, 170 Ct. Cl. at 485, 343 F. 2d at 962. "Plaintiffs must also show that the contracting officer overreached them by accepting their bids though he knew or should have known they were mistaken." *Ruggiero* v. *United States*, 190 Ct. Cl. 327, 339, 420 F. 2d 709, 716 (1970).

Plaintiff's burden in making these showings is to adduce factors which under the facts and circumstances of the particular case should reasonably have raised the presumption of error in the mind of the contracting officer. *Wender Presses, Inc.* v. *United States*, 170 Ct. Cl. at 486, 343 F. 2d at 963; *Chernick* v. *United States*, 178 Ct. Cl. 498, 504, 372 F. 2d 492, 496 (1967); *Space Corp.* v. *United States*, 200 Ct. Cl. 1, 19, 470 F. 2d 536, 540 (1972); Welch, *Mistakes in Bids*, 18 Fed. B.J. 75, 83 (1958). Several of the factors which raise the presumption of error are collected in Doke, *Mistakes in Government Contracts—Error Detection Duty of Contracting Officers*, 18 Sw. L.J. 1 (1964). Extended discussion of classical mistake factors is unnecessary as plaintiff does not rely on any of them, and even concedes

that it is unable to find a case in direct support of its position.

Plaintiff's inability to find a supporting case doubtlessly stems from the basic flaw in plaintiff's argument. There is no mistake in plaintiff's bid. Legally, for there to be a mistake there must be a discrepancy between an offerer's state of mind and his offer. Restatement, Contracts § 500 (1932); 5 Williston, Contracts § 1535 (Rev. ed. 1937). *See*, *Russell & Pugh Lumber Company* v. *United States*, 154 Ct. Cl. 122, 127, 290 F. 2d 938, 941 (1961). Plaintiff in submitting its bid stood ready to perform the contract according to its conditions at the price stated in its bid.

Plaintiff's losses on its July contract were not the product of a difference in plaintiff's state of mind and its bid. Rather, as plaintiff acknowledges the losses resulted from the termination of the price freeze. Changes in economic conditions do not create mistakes. Mistakes are committed, not created. Certainly, between two private parties, plaintiff could not recover for the termination of the price freeze, Restatement, Contracts § 467 (1932); 6 Williston, Contracts § 1963 (Rev. ed. 1938); *see*, 17 Am. Jur. 2d, Contracts § 402 (1964), and when contracting the Government must be regarded as a private party. *Cooke* v. *United States*, 91 U.S. 389 (1875).

Plaintiff, in its Count I plea for relief based on the theory that the termination of the price freeze created a mistake in its bid, cites several decisions of this court, some of which are noted above, including *Ruggiero* v. *United States*, *supra*. That case, rather than supporting plaintiff's mistake argument, delivers the *coup de grace:*

> * * * The mistake, to invoke such principles [recision or reformation], must be, as in the cases cited, a clear cut clerical or arithmetical error, or misreading of specifications, and the authorities cited do not extend to mistakes of judgment. * * * *Ruggiero* v. *United States*, *supra*, 190 Ct. Cl. at 335, 420 F. 2d at 713.

The mistake in plaintiff's bid, if any, resulted not from any clear cut clerical, arithmetical or specification misreading error or a difference between what plaintiff intended to bid and its actual submitted bid. The mistake resulted from

plaintiff's mistaken judgment as to economic conditions, and the continued existence of the price freeze, a mistake for which relief cannot be granted.

Plaintiff's legal argument, while novel, can neither be supported nor sustained, and plaintiff cannot recover on its July contract on a mistake-in-bid theory.

Lastly, plaintiff, while quick to impute liability to defendant, seemingly ignores its own culpability for its July contract losses. The price freeze was terminated on July 18, 1973. Plaintiff's bid was not accepted until July 20, 1973. If, as plaintiff says, "[t]he impact of the lifting of the price controls was swift and sure in coming and to be anticipated",[14] plaintiff had two days in which to withdraw or modify its bid. The contract authorized bid modifications or withdrawal by mail or telegram up to the time of bid opening. Plaintiff's failure to withdraw or modify its bid, in the face of what it describes as immediate poultry price increases,[15] is both telling and not without legal significance.

Even with the sure, swift and immediate rise in poultry prices following the July 18, 1973 termination of the price freeze, plaintiff waited until August 9, 1973 to bring its cost increases problems to the attention of the Contracting Officer. In view of plaintiff's actions, it is difficult to accept its contention that the Contracting Officer knew or should have known of the mistake in plaintiff's bid created by the termination of the price freeze, when plaintiff with a two-day opportunity to withdraw its bid not only took no action but even remained silent for more than three weeks. Equally, it is doubtful whether on the termination of the price freeze, had the cost of poultry declined, that plaintiff would have clamored with as much vigor for a decrease in its bid price. Plaintiff's apparent wait and see attitude cannot be condoned.

Plaintiff might well have considered the merits of utilizing a price escalation clause, or securing a firm price commitment from its suppliers before entering into these contracts. A Government contractor, regardless of its size, locality or experience, is bound to understand the complexities and consequences of its undertaking. *Massachusetts*

[14] Pltf's Brief, p. 9.
[15] *Id.*

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Port Authority v. *United States*, 197 Ct. Cl. 721, 726, 456 F. 2d 782, 784 (1972).

Plaintiff's June and July supply contracts are valid and enforceable according to their terms. Plaintiff is not entitled to recovery on either of these contracts.

Plaintiff's motion for summary judgment is denied, and its petition is dismissed. Defendant's motion for summary judgment is granted.

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531 F. 2d 495

WESTERN SHOSHONE LEGAL DEFENSE AND EDUCATION ASSOCIATION AND FRANK TEMOKE, APPELLANTS v. THE UNITED STATES AND THE WESTERN SHOSHONE IDENTIFIABLE GROUP, REPRESENTED BY THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA, APPELLEES

Appeal No. 3–75

Ind. Cl. Comm. Docket No. 326–K

[Decided February 18, 1976]

ON MOTION TO DISMISS APPEAL FROM THE INDIAN CLAIMS COMMISSION AND ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

Indian Claims; appeal from Indian Claims Commission; timeliness of petition for intervention.—In 1951 an action was filed with the Indian Claims Commission on behalf of the Western Bands of the Shoshone Nations (represented by Temoak Bands of Western Shoshone Indians) for the taking without compensation of lands in Nevada and California including lands covered by the treaty with Western Bands of Shoshone Indians, Treaty of Ruby Valley. In 1962 the Commission decided that the claimants held aboriginal title to certain areas in the two states and determined, as to the California property, that title was extinguished in March 1853, but as to the Nevada lands the Commission was unable at that time to set the acquisition dates. In 1966 the claimants and the Government stipulated the valuation date of the Nevada lands as July 1, 1872; on that basis the Commission in 1967 tried the fair market value of the area; in 1972 the Commission decided the valuation issues; in 1973 the Government filed its setoffs against the award; and by March 5, 1974 the setoff issues were tried and submitted to the Commission. On April 18, 1974 the Western Shoshone Legal Defense and Education Association and Frank Temoke, as part of

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the Western Shoshone Identifiable Group, filed a petition to stay proceedings and for leave to present an amended claim, asserting that the Western Shoshone still have title to a large area of Nevada land as to which the Commission had determined that Indian title had been extinguished and for which it had made an award. Following opposition by the original claimants and oral argument, the Commission issued an opinion and order dismissing the petition. An appeal from this order was filed. It is *held* (1) that the court has jurisdiction of the appeal and that appellants have the right to seek review here; (2) that Sec. 10 of the Act is operative prima facie since the claimants before the Commission have been recognized by the Secretary of the Interior as possessing authority to maintain a suit and the Commission determined that they had the right to maintain the action for and on behalf of the aboriginal Western Shoshone Identifiable Group, the land-using entity; (3) that fraud and collusion have not been proved or sufficiently shown absent information supporting the charges; (4) that the present appellant-intervenors' attempt to intercede at this late date requires, at the least, a showing more compelling than made here; (5) that appellants' contention that they are entitled to a trial or evidentiary hearing must be rejected; the proffers before the Commission could all be accepted *arguendo* without necessitating a trial or hearing since they were irrelevant to the issues properly posed under Sec. 10 of the Act; and (6) the Commission did not err in rejecting appellants' petition to present an amended claim and for a stay of proceedings. The opinion and order dismissing the petition are affirmed.

Indians; Indian Claims Commission; appellate review by Court of Claims; final determination reviewable by court.

[1] Sec. 20(b) of the Indian Claims Commission Act, 25 U.S.C. § 70s(b), providing for an appeal to this court from any final determination of the Commission is not limited to those determinations deciding the merits of an Indian entity's claim but embraces all types of holdings made by the Commission, provided always that the requisite finality is present.

Courts ⇐ 449(4)

Indians; Indian Claims Commission; appellate review by Court of Claims; intervention petition, denial of by Commission.

[2] An order of the Indian Claims Commission definitely denying leave of the present appellants to present an amended claim (in this instance equivalent to a motion for intervention), is sufficiently conclusive for appellants to seek review by this court under Sec. 20(b) of the Indian Claims Commission Act.

Courts ⇐ 449(4)

Indians; Indian Claims Commission; parties; identifiable group.

[3] Sec. 10 of the Indian Claims Commission Act, 25 U.S.C. § 70i, gives the exclusive privilege of pursuing a claim to a recognized

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tribal organization unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission. Where the Commission in 1962 found that the Temoak Bands of Western Shoshone Indians, Nevada, was organized under the Indian Reorganization Act of 1934 and was recognized by the Secretary of the Interior as having authority to maintain a suit before the Commission, and the Commission ruled expressly that said Temoak Bands had the right to maintain an action for the alleged taking without compensation of large acreage in Nevada and California for and on behalf of the aboriginal Western Shoshone Identifiable Group, the land-using entity, Sec. 10 is operative prima facie. Another group must show the statutory or some comparable justification in order to displace the Temoak Bands from their role of exclusive representation.

United States ⟸ 113

Indian claims; pleading and practice; presentation of claim; fraud.

[4] Absent supporting information or detail warranting further inquiries, unsupported charges in this court that counsel for the Indian group determined by the Indian Claims Commission to possess the right to maintain the taking claims on behalf of the land-using entity practiced fraud by misleading the present appellant-Indians as to the nature and scope of the Commission proceedings, are insufficient to call for a trial or evidentiary hearing.

United States ⟸ 113

Indian claims; pleading and practice; presentation of claim; collusion.

[5] Where the Indian Claims Commission determined that the Temoak Bands of Western Shoshone Indians, Nevada, had the right to maintain the claim of taking of a large area in Nevada and California on behalf of the land-using entity, and in 1962 decided that the claimants held aboriginal title to certain acreage, and where in 1966 the said claimants and the Government stipulated the valuation dates for the Nevada lands, the stipulation cannot be considered "collusion" within the intendment of Sec. 10 of the Indian Claims Commission Act. It was a proper application of the admonition that parties to litigation should attempt to agree, if possible, upon one or a few valuation dates rather than undertake a burdensome individual computation of value as of the date of disposal of each separate tract.

United States ⟸ 113

Indian claims; Indian Claims Commission Act; construction and operation.

[6] Absent indication that Congress used "collusion" in Sec. 10 of the Indian Claims Commission Act as having a special meaning and one different from its ordinary connotation of an underhanded, nonadversary agreement in derogation of the rights of the Indians, it

is the path of wisdom to follow the normal, common understanding when interpreting and applying the statute.

United States ⇐ 105

Indian claims; Indian Claims Commission Act; presentation of claim; collusion.

[7] If "collusion" automatically exists every time a segment of the Indian entity disagrees with the litigating position taken by the exclusive representative, there is little left to the "exclusive privilege of representing such Indians" granted by Sec. 10 of the Indian Claims Commission Act to a recognized tribal organization.

United States ⇐ 105

Indian claims; pleading and practice; motion to intervene; failure to file timely claim with Commission.

[8] The longer the delay in seeking to enter a proceeding while pertinent litigation has been going on, the more impressive a showing the latecomer must make to be able to participate in the proceedings or to initiate a new issue. Thus, where the Indian Claims Commission determined that an Indian group had the right to maintain the taking claim on behalf of the land-using entity and determined that the claimants held aboriginal title to certain acreage which was taken by the United States, and where appellant-intervenors waited many years to move to amend the claim (i.e. to intervene) before the Commission and to assert their opposing viewpoint that the lands were never taken and are still owned by the Identifiable Group, although fully aware of, and opposed to, what was occurring in those proceedings and without giving adequate excuse for the long delay, the motion comes too late and must be rejected.

United States ⇐ 113

Indian Claims; Indian Claims Commission; jurisdiction of Commission; tribal v. individual claims.

[9] A claim under the Indian Claims Commission Act is not an aggregation of individual claims but a group claim on behalf of a tribe, band or other identifiable group. It is unlike a class suit.

United States ⇐ 105

Indian claims; Indian Claims Commission Act; hearings.

[10] Nothing in the Indian Claims Commission Act or the Commission's Rules automatically entitles the present intervenor-appellants to a trial or evidentiary hearing simply because they have raised questions as to whether the recognized tribal organization properly represents the entire Western Shoshone Identifiable Group. Sec. 17 of the Act while calling for evidence on the substantive determination of a claim, does not preclude the Commission from deciding issues such as intervention or participation on the basis of argument and proffers of fact. Similarly, the Commis-

sion's Rule 10 requires a trial on such issues only when ordered by the Commission.
United States ⇐ 113

Kathryn Collard for appellants; *John D. O'Connell*, attorney of record.

Robert W. Barker, attorney of record, for appellee, Western Shoshone Identifiable Group. *Wilkinson, Cragun & Barker*, *Donald C. Gormley* and *Steven C. Lambert*, of counsel.

Dean K. Dunsmore, with whom was *Acting Assistant Attorney General Walter Kiechel, Jr.*, for appellee The United States.

Before DAVIS, SKELTON and KUNZIG, *Judges*.

DAVIS, *Judge*, delivered the opinion of the court:

In August 1951 the Shoshones timely filed a petition with the Indian Claims Commission setting forth, among other claims, a cause of action on behalf of the Western Bands of the Shoshone Nations (represented by plaintiff-appellee Temoak Bands of Western Shoshone Indians) for the taking without compensation of large acreage in Nevada and California, including lands covered by the Treaty with Western Bands of Shoshone Indians (Treaty of Ruby Valley), Oct. 1, 1863, 18 Stat. 689 (1875). The United States denied this alleged taking. In 1957 the Indians' title to this land was tried before the Commission and in 1962 the Commission decided that the claimants held aboriginal title to 24,396,403 acres—22,211,753 in Nevada and 2,184,650 in California. 11 Ind. Cl. Comm. 387, 413–14; *see* 29 Ind. Cl. Comm. 5, 6. For the California property this aboriginal title was found to have been extinguished in March 1853. With respect to the Nevada portion, the Commission determined that the land was continuously used and occupied "until by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens, the way of life of these Indians was disrupted and they were deprived of their lands. For these reasons the Commission may not now definitely set the date of acquisition

of these lands by the United States." 11 Ind. Cl. Comm. at 415–16.

In 1966 the plaintiff-appellee and the defendant-appellee stipulated that the valuation date of the Nevada portion would be July 1, 1872, and on that basis the parties tried, in 1967, the fair market value of this area. In October 1972 the Commission decided the valuation issues, awarding the claimant $21,550,000 as value on the respective valuation dates and an additional $4,604,600 for minerals removed from the Nevada tract before the valuation date. 29 Ind. Cl. Comm. 5, 7, 57–58. The Government filed a motion for rehearing which was denied in 1973. 29 Ind. Cl. Comm. 472. In that same year the Government filed its set-offs against the award; these issues were tried and submitted to the Commission by March 5, 1974.

It was at this stage of the proceedings that, on April 18, 1974, appellants Western Shoshone Legal Defense and Education Association and Frank Temoke, as part of the Western Shoshone Identifiable Group, filed their petition to stay proceedings and for leave to present an amended claim. The gist of this petition was that the Western Shoshone still have title to approximately twelve million acres of Nevada land to which the Commission had held Indian title to have been extinguished and for which it had made a large award (subject to offsets).[1] Appellants fear that this award, if paid, will bar any future attempt to litigate elsewhere the present title to these lands. *See* 25 U.S.C. § 70u.[2] Acknowledging that Section 10 of the Claims Commission Act, 25 U.S.C. § 70i, gives a tribal organization recognized by the Secretary of the Interior "the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on

[1] Appellants' theory, in brief, is that the Western Shoshones had recognized title to the lands which was never taken in largest part, and that, even if the ownership was merely aboriginal title, that title could only be ended for the purposes specified in the Treaty of Ruby Valley, *supra*—and title to most of the lands has never been extinguished on those grounds.

[2] Section 22 of the Indian Claims Commission Act which provides that (1) payment of any claim, after a determination under the Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy, and (2) a final determination against a claimant made and reported in accordance with the Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

the part of such organization be shown to the satisfaction of the Commission," the appellants claimed "collusion" between the appellee Temoak Bands and the Government to treat the title to the lands as extinguished rather than as still held by the Indians.

When the United States and the Western Shoshone Identifiable Group, as represented by the appellee Temoak Bands, both opposed this petition, the Commission had oral argument, principally on the question of collusion, and on February 20, 1975, issued its opinion and order dismissing the petition. 35 Ind. Cl. Comm. 457. Appellants then filed a timely notice of appeal which triggered a motion by the Western Shoshone Identifiable Group to dismiss the appeal.

We held oral argument on the motion to dismiss but at that time directed the parties to file briefs on the appeal itself.[3] Now we deny the motion to dismiss but affirm the Commission's decision rejecting appellants' petition.

I.

Section 20(b) of the Indian Claims Commission Act, 25 U.S.C. § 70s(b), provides for an appeal to this court from any "final determination" of the Commission. We have already ruled that this provision is not limited to those determinations deciding the merits of an Indian entity's claim but embraces all types of holdings made by the Commission, provided always that the requisite finality is present. *Red Lake & Pembina Bands* v. *Turtle Mountain Band of Chippewa Indians*, 173 Ct. Cl. 928, 934–35, 355 F. 2d 936, 939–40 (1965). "The Act nowhere suggests that certain areas of Commission decision are to be left without appellate review and guidance; * * *. Nor does the legislative history intimate that this court's power to review should cover fewer subjects than the Commission's power to decide." *Ibid. See also Cherokee Nation* v. *United States*, 174 Ct. Cl. 131, 135–39, 355 F. 2d 945, 947–49 (1966). In particular we have held that an order definitely denying intervention, on the ground that the intervenor had no right, is sufficiently

[3] The Government did not join in the motion to dismiss the appeal or take any position thereon but it has participated in the consideration of the appeal in support of the Commission's determination.

conclusive for appeal. *Prairie Band of Potawatomi Indians* v. *United States*, 143 Ct. Cl. 131, 133–35, 165 F. Supp. 139, 141–42 (1958), *cert. denied*, 359 U.S. 908 (1959).

Though it was not formally labeled a motion for intervention, the appellants' petition to the tribunal below was equivalent to such an application.[4] It sought leave to present an amended claim on behalf of the Western Shoshone Identifiable Group and to argue in support of that position. The Commission treated the petition in the same way it would deal with an intervention motion. It considered whether appellants had a right to participate in this proceeding and, after deciding that they had not, dismissed the petition finally. On that subject nothing was left for further consideration by the Commission; appellants were definitively refused permission to enter the case and the proceedings were left to continue between the original plaintiff and the Government. Insofar as the Commission was concerned, appellants' connection with the litigation was ended; and that determination of closure was both severed and severable from the final determination of the award to be made to the Western Shoshone Identifiable Group. *Cf. United States* v. *Fort Sill Apache Tribe*, 205 Ct. Cl. 805, 807–808, 809, 507 F. 2d 861, 863–64, 864 (1974).

Accordingly, we hold that this court has jurisdiction of the appeal and that the appellants have the right to seek review here. The motion to dismiss the appeal is denied and we proceed to the merits of the appeal.[5]

II.

In passing on the correctness of the Commission's rejection of appellants' petition, we are impressed by two intertwined and striking sets of facts. The first is that that document was first thrust upon the Commission and the parties in

[4] In oral argument before the Commission counsel for appellants said (Transcript of Nov. 14, 1974, at 54): "We are trying to intervene. We would like to just reopen that particular question."

[5] A separate oral argument was not had on the appeal itself but the parties were expressly given an opportunity to argue the merits during the argument on the motion to dismiss. Appellants did not avail themselves of that opportunity (through the merits were touched on in the Indian appellee's motion to dismiss), but the appeal has since been thoroughly briefed and the court does not deem further oral presentation to be required.

1974, some 23 years after this Western Shoshone claim was first made to the Commission in 1951, some 12 years after the Commission had decided (in 1962) that the United States had extinguished the claimant's title to the large areas involved, eight years after the Commission had approved (in 1966) the parties' stipulation as to the valuation date of these lands, about one and one-half years after the Commission had determined (in October 1972) the actual value of the property, and about a month after the problem of offsets had been tried and submitted for disposition. Thus, the appellants did not seek to put their view before the Commission until after the trial and decision on liability, a separate trial and decision on valuation, and another separate hearing on offsets. On this Nevada-land phase of the Western Shoshone claims there was very little left to do; much time had passed, and much had been done.

The second noteworthy fact is that there is no doubt whatever that appellants were for a very long time quite aware of the position with respect to this Nevada land taken before the Commission by appellee Temoak Bands and its counsel. Appellants' petition presented to the Commission on April 18, 1974, said (p. 4): "Petitioners, individual members of the Petitioner Association [appellant Western Shoshone Legal Defense and Education Association], and their predecessors on numerous occasions *over the past thirty-nine years* have resisted any legal action jeopardizing the rights and interests of the Western Shoshone Indians in their tribal lands and have made repeated protests, against the inclusion of such lands in the Claim filed in the above captioned proceeding to the officers of the Temoak Bands of Western Shoshone Indians, the Claims attorneys retained by said organization (see copy of letter from Robert W. Barker attached hereto as Exhibit A) and to representatives of The United States of America" (emphasis added). One of the incidents specifically mentioned occurred in October 1965. In this court in their response to the motion to dismiss the appeal appellants observe (pp. 1–2): "The underlying dispute, which has culminated in this appeal, in reality is, and has for many years, been between appellants (and their predecessors) and the Counsel of Record for the Identifiable

Group (and his predecessors). The appellants have consistently resisted the inclusion within the Claim, filed in the Indian Claims Commission on behalf of the entire Identifiable Group, lands to which they still assert unextinguished aboriginal title and treaty title for the simple reason that their right to assert title to such lands will be forever barred by operation of 25 U.S.C. 70u" (*see* note 2 supra).[6]

It is in the light of these cardinal facts—(1) that appellants waited so many years to move before the Commission (2) although fully aware of, and opposed to, what was occurring in those proceedings, and (3) without giving any adequate excuse for the long delay—that we must assess their right to come in and participate at the current stage.

As we have already noted, appellants concede that Congress has addressed itself to that question in the Indian Claims Commission Act. Section 10, 25 U.S.C. § 70i, gives the exclusive privilege of pursuing the claim to a recognized tribal organization "unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission."[7] The Commission found in its findings and opinion of 1962 that the Temoak Bands of Western Shoshone Indians, Nevada, was organized under the Indian Reorganization Act of 1934, 48 Stat. 984, and was recognized by the Secretary of the Interior as having authority to maintain a suit. 11 Ind. Cl. Comm. 387, 388. The interlocutory order entered at that time ruled expressly that the Temoak Bands of Western Shoshone Indians, Nevada, has the right to maintain this action for and on behalf of the aboriginal Western Shoshone Identifiable Group, the land-using entity. Section

[6] This statement is repeated in appellants' brief on appeal at page 4. That brief also says (pp. 13–14): "Repeatedly over the years, at these 'General Councils' [the Councils referred to were held in 1947 and 1959] and elsewhere appellants and other members of the Identifiable Group expressed the concern of the people that pursuing the Claim before the Commission would forfeit their claim of recognized title to the vacant lands within the Treaty boundaries."

[7] As it appears in the United States Code, Section 10 reads as follows:

"Any claim within the provisions of this chapter may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission."

10 is therefore operative *prima facie*, and appellants must show "fraud, collusion, or laches" (or some comparable justification) in order to displace the Temoak Bands from their role of exclusive representation.[8]

The exception for "fraud" (as separate from "collusion") can be disposed of summarily. Before the Commission appellants did not claim that the Temoak Bands or their counsel had defrauded the other members of the Western Shoshone Identifiable Group nor did the various proffers of proof made by appellants suggest such fraud. In this court appellants have expanded their argument to include strong intimations that the counsel for the Indian appellees deliberately misled the Indians as to the nature and scope of the Commission proceedings.[9] But these general allegations are not supported by anything—neither affidavits nor documentation—and they are opposed by affidavits supplied to this court by the Indian appellees. In the absence of some supporting information or detail warranting further inquiries, these belated and unsupported charges of fraud are insufficient to call for a trial or evidentiary hearing. To open up the proceedings, at this late date, on the ground that the bulk of the Identifiable Group has been defrauded requires more than the mere allegations set forth in the briefs in this court.[10] There is no problem of the concealment of the alleged fraud; the asserted "misrepresentations" have long been known to appellants.

As for collusion,[11] the Commission found, on the basis of the undisputed record and the appellants' own proffers, that there was no collusion in the conventional sense of that term. We accept and agree with that finding. There was no underhanded agreement, explicit or tacit, between the Temoak

[8] Appellants do not claim laches on the part of the exclusive representative.

[9] We could refuse to consider these new charges of fraud since appellants failed to present them to the Commission below. *Turtle Mountain Band of Chippewa Indians* v. *United States*, 203 Ct. Cl. 426, 435–36, 443–44, 490 F. 2d 935, 940, 945 (1974).

[10] Plaintiff appellee correctly points out that further delay in the termination of this proceeding may very likely cost the Western Shoshone Identifiable Group a very substantial sum of money since interest does not accrue on an award for the taking of Indian title until the amount is paid. *See United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48 (1951).

[11] Before the Commission appellants agreed that they would have to show "collusion," properly interpreted, in order to be allowed to participate in this proceeding.

Bands and the Government for the former to give up a position more advantageous to the Western Shoshone Identifiable Group or to adopt one more favorable to the Government. What there was in actual fact was a deliberate but unilateral choice in the original petition before the Commission to claim compensation for the "taking" of a very large portion of Nevada land. The Government denied that the Indians ever owned this land or that it owed them any money for the land under the Claims Commission Act. After a trial contested on these grounds, the Commission held that the Western Shoshones held aboriginal title to the territory involved here and that this title was extinguished by a process of gradual encroachment by whites and settlers. Appellants insist that the subject of title-extinction was never tried, going simply by the concurrent agreement of the parties. But evidence on that issue was contained in the materials presented at the 1957 trial and the Indian appellees asked generally for findings that the Shoshone lands had been taken; the Government consistently maintained that the Indians never owned the lands they claimed and therefore that the question of title-extinction never arose. The Commission made its own determination that the Shoshone lands were held by separate Shoshone entities and that Indian title to the area in question was extinguished by encroachment.

The parties, instead of having a further trial on the valuation date or dates, then agreed to stipulate that the Nevada lands should be valued as of July 1, 1872, and the Commission accepted this agreement as an implementation of its prior finding of extinguishment. This stipulation was not collusion but a proper application of the admonition that parties to such litigation should attempt to agree, if possible, upon one or a few valuation dates rather than undertake a burdensome individual computation of value as of the date of disposal of each separate tract. *See Creek Nations* v. *United States*, 302 U.S. 620, 622 (1938); *United States* v. *Northern Paiute Nation*, 203 Ct. Cl. 468, 473, 490 F. 2d 954, 957 (1974); *United States* v. *Pueblo of San Ildefonso*, 206 Ct. Cl. 649, 664, 513 F. 2d 1383, 1391 (1975). Appellants gave

the Commission and gave us no adequate reason to think that the choice of this particular date was unreasonable or an abandonment of the Indians' true interests.

This determination of no collusion is inevitable under the record of this case. Appellants' proffers to the Commission add nothing which is pertinent, and even if accepted at face value do not call for any change in the conclusion.[12] The same is true of the enlarged allegations of collusion made to this court, insofar as they should be considered; we have already pointed out that we need not take account of the newly and belatedly interjected charges of fraud on the Indians by counsel for plaintiff-appellee and by officials of the Bureau of Indian Affairs, allegations which are wholly unsupported.

Appellants attempt to avoid this result by arguing that "collusion," in Section 10 of the Claims Commission Act, is not restricted to its normal meaning of an underhanded, non-adversary agreement in derogation of the rights of the Indians but embraces also the presentation of any contention, even without bad faith or improper conduct, by the exclusive representative which happens not to accord with the view of other members of the identifiable group as to the entity's best interests. In this instance, appellants say that there was collusion, as a matter of law, because the exclusive representative urged that the Indians' title had been extinguished—and therefore compensation was due—rather than arguing that the Indians still owned the land under the Treaty of Ruby Valley—and therefore that there was no claim under the Indian Claims Commission Act.

There are two main answers to this point. The first is that there is nothing to indicate that Congress used "collusion" in that expanded and strained sense, far different from its

[12] The proffers before the Commission simply spelled out appellants' legal theory that the Nevada lands still belonged to the Western Shoshone Identifiable Group, asserted that appellants had protested the conduct by plaintiff-appellee of the litigation, asserted generally that the stipulation as to date of taking was prejudicial, said generally that the "Western Shoshone people, through their traditional leaders [*i.e.* appellants] and by their own individual actions have continued to assert their common ownership," and alleged that the vast majority of the members of the Identifiable Group "now" desire to have the issue of the current validity of their title determined before an award is paid under the Claims Commission Act.

ordinary connotation. Unless there are good grounds for thinking that the legislature meant an ordinary word to have a special meaning, it is the path of wisdom to follow the normal, common understanding. *Malat* v. *Riddell*, 383 U.S. 569 (1966); *Richards* v. *United States*, 369 U.S. 1, 9 (1962); *Selman* v. *United States*, 204 Ct. Cl. 675, 680, 498 F. 2d 1354, 1356 (1974).

Secondly, appellants' unique understanding of "collusion" would undercut the position of the exclusive representative to which Congress assigned the chief management of the litigation. If "collusion" automatically exists every time a segment of the Indian entity disagrees with the litigating position taken by the exclusive representative, then there is little left to the "exclusive privilege of representing such Indians" granted by the statute to a recognized tribal organization. Congress could not have meant to leave the status of the exclusive representative so vulnerable to attack by any part of the represented group, no matter how minor or uninformed or how often voted down in the internal proceedings of the recognized entity.

But, say appellants, their position is not that of a minority but of the majority of the Western Shoshone Identifiable Group and that majority has had no way of causing the recognized organization, the Temoak Bands, to see the light. In the Commission below, however, appellants did not assert that a majority of the Identifiable Group was opposed to the Temoak Bands' position in 1951 (filing of the claim) or 1957 (hearing on title) or 1962 (determination of title extinction) or 1966 (stipulation as to date of valuation) or 1967 (trial on valuation) or 1972 (determination of valuation)—the dates of the crucial steps in this proceeding. The only proffer was that the "vast majority of the people comprising the Western Shoshone Identifiable Group *now* desire to have the issue of the validity of their title" (emphasis added) to the Nevada lands determined before the close of Commission proceedings, and even then there was no support for this allegation as to the balance of views in 1974. In this court appellants have apparently widened their proffers to say that a majority was at all times against the

position of appellee Temoak Bands.[13] But again there is no supporting detail, no affidavit, no attempt to make a prima facie showing that the allegation is true or at least worthy of an extended inquiry.

We hark back to the long lapse of time before the appellants filed their petition in 1974, and the prejudice to the other parties which occurred because appellants (and those they say they represent) allowed years to go by before they sought to insert their viewpoint into these proceedings. In view of this long and prejudicial delay, it is fair to insist that appellants buttress their allegations by more than self-serving generalities if they are to be accorded a trial.[14]

The law furnishes helpful analogies for the proposition that the longer the delay, while pertinent litigation has been going on, the more impressive a showing the latecomer must make to be able to participate in the proceedings or to initiate a new problem. For instance, the longer the delay the easier it is to find laches (where laches applies). *Gersten* v. *United States*, 176 Ct. Cl. 633, 636, 364 F. 2d 850, 852 (1966). Intervention under Rule 24 of the Federal Rules of Civil Procedure, the intervention rule, is denied where delay is undue and the rights of the original parties may well be prejudiced. *See, e.g., Gerstle* v. *Continental Airlines, Inc.*, 466 F. 2d 1374, 1377–78 (C.A. 10, 1972); *MacQueen* v. *Lambert*, 348 F. Supp. 1334, 1335–36 (M.D. Fla. 1972). Also, the law is developing a critical eye toward persons who, knowing that a pending action is designed to stabilize legal relationships that concern them, deliberately stay out of that litigation although they could easily enter it. *Cf. Provident*

[13] Appellants' brief on appeal says (p. 15): "During the entire proceeding before the Indian Claims Commission, counsel for the Identifiable Group and counsel for the United States failed to inform the Commission that a majority of the members of the Identifiable Group asserts unextinguished aboriginal and recognized title to the lands within the boundaries of the *Treaty of Ruby Valley.*"

[14] Section 8(b) of the Commission's General Rules of Procedure calls upon a petitioner challenging the failure of the exclusive representative to take certain action to "set forth *with particularity* the efforts of the petitioner to secure from the duly constituted and recognized officers of said tribal organization such action as he desires and the reasons for his failure to obtain such action (such as fraud, collusion or laches) or the reasons for not making such effort" (emphasis added). The degree of particularity may well depend on the lateness of the application.

Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 114 (1968); *Aerojet-General Corp.* v. *Askew*, 511 F. 2d 710, 718–20 (C.A. 5), *cert. denied*, 423 U.S. 908 (1975); *Gamboez* v. *Yelencsics*, 468 F. 2d 837 (C.A. 3, 1972). Specifically in Indian Claims Commission Act litigation, this court has held that Tribe W could not intervene in a suit brought by Tribe K, some twenty years after the action was first brought, where the intervention, if allowed, could lead to the defeat of K's claim. "It would work an injustice to allow them to join in a timely filed suit by the Appellees when the result of that intervention may be the defeat of the Appellees' claim, and of any claim." *United States* v. *Kiowa, Comanche & Apache Tribes*, 202 Ct. Cl. 29, 44–45, 479 F. 2d 1369, 1377–78 (1973), *cert. denied sub nom. Wichita Indian Tribe* v. *United States*, 416 U.S. 936 (1974). We have also rejected as barred by laches (as well as on other grounds) an independent action, delayed eight years, to set aside a settlement judgment of the Commission. "No adequate excuse for eight years of inaction is offered. If they are lawfully in court now, they could have been here then." *Andrade* v. *United States*. 202 Ct. Cl. 988, 996–97, 485 F. 2d 660, 664 (1973), *cert. denied sub nom. Pitt River Tribe* v. *United States*, 419 U.S. 831 (1974).

This general principle that the later a person seeks to enter and disrupt an ongoing litigation the more of a showing he must make impels us, as it did the Commission, to reject appellants' petition. The hour is very late and the showing is not strong. The fact is that at bottom all that appellants have demonstrated is that there is a dispute between an undetermined number of supporters of appellants and the organized entity, the Temoak Bands, over the proper strategy to follow in this litigation. The Indian appellees believe it best for all the Western Shoshone Identifiable Group to contend that the Nevada lands involved were "taken" by the United States and that therefore very large amounts of money are due the Identifiable Group for that extinguishment of title. Appellants, on the other hand, believe that the correct course to pursue is to insist that the

lands were never taken and are still owned by the Identifiable Group (and putatively more valuable today than in 1872). Both positions entail risk. The Indian appellees run the risk of giving up a claim to continued ownership which, if vindicated, could prove to be worth much more and be more satisfying than an award under the Claims Commission Act. Appellants' risk is the opposite: If they should prove wrong in their claim to continued title they would be too late (absent special congressional action) to seek monetary compensation for the "taking" and would have given up, for nothing, a claim to a very large sum. Certainly the arguments in favor of appellants' position are not overwhelming or clear as day.[15] At the best from their viewpoint the question is an open one which could be decided either way. This is precisely the kind of litigation strategy the statute leaves to the organized representative—unless persaps there is timely and immediate intercession by the dissenting group before the proceedings have progressed so far that all parties can properly rely on the litigation position assumed by the organized entity which is the "exclusive" representative.[16]

Plaintiffs make some feints against the constitutionality of Section 10's reposing the privilege of exclusive representation in the organized entity (subject to the exceptions for fraud, collusion or laches). But it makes sense for Con-

[15] Appellants have sketched their substantive arguments for us in some detail (in the form of a copy of the brief submitted to another forum on those questions). The Commission below, without passing on the issues, indicated its great doubt as to the correctness of appellants' position on the merits. 35 Ind. Cl. Comm. 457, 471–76.

[16] Appellants' fear, as we have noted, is that payment of the judgment will, under Section 22 of the Claims Commission Act, 25 U.S.C. § 70u, bar the Identifiable Group from thereafter claiming the land as still its own. They say they seek a final determination of this issue of continued ownership before an award is made, and contend that a pending suit in the District Court for Nevada furnishes that opportunity. The Commission refused to stay its proceedings pending resolution of the Nevada action. We think this was a permissible choice on the Commission's part. Postponement of the conclusion of the present proceeding will harm the Indians monetarily if their claim to continued ownership fails. *See* note 10 *supra*. It may also be noted that the bar of Section 22 does not fail until payment (*see* note 2 *supra*). If the majority of the Identifiable Group wishes to postpone payment, in order to try out the issue of current title, it can, of course, ask Congress to delay making the appropriation and direction which will be necessary to pay the award. *Cf. Turtle Mountain Band of Chippewa Indians* v. *United States*, 203 Ct. Cl. 426, 454–56, 490 F. 2d 935, 951–53 (1974). That course is still open if the majority of the Identifiable Group can be persuaded to follow it.

gress to have taken that position. A claim under the Claims Commission Act is not an aggregation of individual claims but a group claim on behalf of a tribe, band or other identifiable group. *Fort Sill Apache Tribe* v. *United States*, 201 Ct. Cl. 630, 634–35, 477 F. 2d 1360, 1362 (1973), *cert. denied*, 416 U.S. 993 (1974); *Absentee Shawnee Tribe* v. *United States*, 165 Ct. Cl. 510, 514 (1964); *Cherokee Freedmen* v. *United States*, 161 Ct. Cl. 787, 788 (1963). The suing claimant represents that group interest, and it is reasonable to say that at least *prima facie* the organized entity "recognized by the Secretary of the Interior as having authority to represent such [claiming] tribe, band, or group" should be the exclusive suing party. An Indian claim under the Act is unlike a class suit in that there is no necessity that the position of each individual member of the group be represented; it is only the group claim which need be put forward. If there are circumstances in which the organized entity fails properly to represent the group, the normal method of redress is through the internal mechanism of the organized entity. And if there be cases in which that internal mechanism is clogged or unavailable[17] then, at the least, the members claiming to represent the majority interest are required to make their position formally known to the Commission and the other parties as soon as possible—and not after much work has been done, and years have passed, on the unchallenged assumption that the organized entity represents the group. To intercede at so late a date requires, at the least, a compelling showing of the kind not made or even attempted here.[18]

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[17] Although claiming to be members of the Western Shoshone Identifiable Group, appellants say that they do not belong to the Temoak Bands and may also be suggesting that they are not eligible to join.

[18] In *Turtle Mountain Band of Chippewa Indians* v. *United States*, 203 Ct. Cl. 426, 456–59, 490 F. 2d 935, 953–54 (1974), we upheld the Commission's allowing the Little Shell Band to participate in the proceeding as an "identifiable group" along with the Turtle Mountain Band and the Pembina Band. But the Little Shells had participated from the beginning and did not seek to enter in circumstances comparable to the late and conflictual situation present here. The flat statement, in connection with the court's discussion of that question, that "[t]he exclusive right granted [by Section 10] to such an organization extends

Finally, we reject, as we have already suggested, appellants' contention that they are entitled to a trial or evidentiary hearing simply because they have raised questions as to whether the Temoak Bands properly represent the Western Shoshone Identifiable Group. Nothing in the Act or the Commission's Rules gives them such an automatic right,[19] and the Commission did not abuse its discretion in holding that the belated petition for intercession did not contain enough of a detailed factual predicate to call for such a hearing. As we have said, the proffers before the Commission could all be accepted *arguendo*, without necessitating a trial or evidentiary hearing, since they were irrelevant to the issues properly posed under Section 10. The additional proffers advanced in this court are inadequate, both because they were not presented to the Commission below and also because, in any event, they are too unsupported and too general to warrant a trial (or evidentiary hearing) this late in the proceedings and after so long a lag in the initial presentation of appellants' position to the Commission. Appellants tell us that they think they can make their case through the discovery mechanism but, at this point in the proceedings, it is far too late to hope that proof will be obtained through discovery; to upset the applecart after the fruit has been so carefully collected and piled, appellants would have to possess already, and to present, some hard proof justifying the disruption and turn-about-inposition they seek to require.

The Commission did not err in rejecting appellants' petition to present an amended claim and for a stay of the proceedings.

Affirmed

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only to the representation of its own members" (203 Ct. Cl. at 459, 490 F. 2d at 954) was overly broad and is not fully applicable to a case like this in which one organized entity *prima facie* represents the whole ancestral group over many years.

[19] Section 17 of the Claims Commission Act, 25 U.S.C. § 70p, calls for "evidence" on the substantive determination of a claim, but does not preclude the Commission from deciding issues such as intervention or participation on the basis of argument and proffers of fact. Similarly, the Commission's Rule 30 requires a trial on such issues only when ordered by the Commission.

Syllabus

531 F. 2d 490

RONALD L. McDONALD v. THE UNITED STATES

No. 396–73

RICKY A. SANDERS v. THE UNITED STATES

No. 436–73

[Decided February 18, 1976]

ON PLAINTIFFS' MOTIONS AND DEPENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Military pay; courts-martial; Uniform Code of Military Justice; convening authority's powers.—In these consolidated cases, plaintiffs, convicted by courts-martial of assault with intent to commit murder (McDonald) and of wrongful possession and sale of marijuana (Sanders), levy certain attacks on the validity of their convictions; the only attack remaining is that the Uniform Code of Military Justice invalidly gives the convening authority multiple roles in the court-martial process depriving them of due process. Neither plaintiff has shown or made an effort to demonstrate that the convening authority's role led to unfairness in their particular cases. It is *held*, on the materials proffered by the parties, that the court-martial process is not so deficient or so unfair that it necessarily deprives court-martial accuseds, who are subject to conviction and imprisonment under it, of due process of law. Plaintiff's motions for summary judgment are denied, defendant's cross-motion is granted, and the petitions are dismissed.

Military pay; courts-martial; Court of Claims jurisdiction to review. [1] The Court of Claims has jurisdiction to consider nonfrivolous constitutional attacks on court-martial convictions which, if sustained, would render the convictions void.

Armed Services ⇐ 47.1(1)

Military pay; courts-martial; Court of Claims jurisdiction to review. [2] In heeding the Supreme Court's instruction in *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), as to the differences between the civilian judicial system and the military scheme, and the congressional attempt in enacting the Uniform Code of Military Justice to balance the military necessities against the equally significant interest of ensuring fairness to servicemen charged with military offenses and to formulate a mechanism by which the competing interest can be adjusted and the servicemen's constitutional rights vindicated, this court cannot invalidate the convening authority's participation in the court-martial scheme unless, at the least, the court is convinced by a factual showing either that there was injustice in the particular case or that the current system has a decided and inherent tendency toward marked unfairness.

Armed Services ⇐ 47.1(1)

Per Curiam

Constitutional law, Congress, powers of; military rules and regulations; Uniform Code of Military Justice.

[3] For the reasons which differentiate military society from civilian society, Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter. (*Parker* v. *Levy*, 417 U.S. 733 (1974)).

Armed Services ⇐ 1

Military pay; courts-martial; Uniform Code of Military Justice; convening authority's powers.

[4] Where plaintiffs, in challenging the validity of the Uniform Code of Military Justice by contending that the Code gives the convening authority too many powers in the court-martial scheme by assigning to the authority multiple roles in the initiation, prosecution and review of courts-martial, merely attempt to show unfair pressure or intervention by military superiors by way of affidavits from parties unconnected with plaintiffs' cases or with the commands in which plaintiffs served, the affidavits containing broad conclusory statements of general unfairness or a few specific episodes (separate from plaintiffs' cases), but plaintiffs do not show or make an effort to demonstrate that the convening authority's role led to unfairness in their particular situations, the court cannot hold, on the materials proffered, that the court-martial process is so deficient or so unfair that it violates the Due Process Clause as applied to the present plaintiffs.

⇐Armed Services ⇐ 47.1(1)

J. Francis Pohlhaus, attorney of record, for plaintiffs. *Nathaniel R. Jones*, of counsel.

Alan L. Ferber, with whom was *Assistant Attorney General Rex E. Lee*, for defendant. *Frances L. Nunn*, of counsel.

Before COWEN, *Chief Judge*, DAVIS and KASHIWA, *Judges*.

PER CURIAM: In these consolidated cases, enlisted marines were convicted by separate general courts-martial of violations of the Uniform Code of Military Justice, and sentenced to terms of imprisonment and bad conduct discharges. After completion of appellate review within the military system, they brought these actions for back-pay, asserting among other reasons that their convictions were constitutionally invalid because of the involvement under the Uniform Code of the convening authority in the court-martial process.

207-954—77——6

Per Curiam

Ronald McDonald, whose crime was assault with intent to commit murder, levied three attacks on his court-martial: (1) Inclusion in the record submitted to the reviewing authorities of an investigative report made pursuant to Article 32 of the Uniform Code violated due process and his right of confrontation; (2) the Code's assignment of multiple roles to the convening authority violated due process; and (3) the general article, Article 134, 10 U.S.C. § 934, under which he was convicted is vague and overbroad. The first contention was rejected in an opinion of the court on December 18, 1974, *McDonald* v. *United States*, 205 Ct. Cl. 780, 507 F. 2d 1271. The third point is no longer viable after *Parker* v. *Levy*, 417 U.S. 733, 757–58 (1974), and *Secretary of the Navy* v. *Avrech*, 418 U.S. 676 (1974). *See Augenblick* v. *United States*, 206 Ct. Cl. 74, 79–80, 509 F. 2d 1157, 1160, *cert. denied*, 422 U.S. 1007 (1975). There remains only the claim that the Uniform Code invalidly gives the convening authority too many powers in the court-martial scheme.

Ricky Sanders was convicted of wrongful possession and sale of marijuana, under Article 134, 10 U.S.C. § 934. His claim of the invalidity of that statute is likewise foreclosed by *Parker* and *Avrech*, *supra*, but he also presses the unconstitutionality of "the provisions of law of the Uniform Code of Military Justice that assign multiple roles to the convening authority in the initiation, prosecution, and review of courts martial."

The contention in both cases is that Congress acted unconstitutionally in the Uniform Code when it combined in the convening authority the powers to (1) select the members of the court-martial (Art. 25(d)(2), 10 U.S.C. § 825(d)(2)); (2) to detail the military judge (Art. 26(a), 10 U.S.C. § 826(a)); (3) to detail the trial counsel and defense counsel (Art. 27 (a), 10 U.S.C. § 827(a)); (4) to refer the charges to the court-martial (Art. 34, 10 U.S.C. § 834; *cf.* Art. 18, 10 U.S.C. § 818; Art. 22, 10 U.S.C. § 822; Art. 30, 10 U.S.C. § 830; Art. 33, 10 U.S.C. § 833); (5) to review the court-martial record and take action thereon (Art. 60, 10 U.S.C § 860); (6) to return for reconsideration and appropriate action specifications dismissed without a finding of not guilty

(Art. 62(a), 10 U.S.C. § 862(a)); and (7) to approve or disapprove the findings and sentence (Art. 64, 10 U.S.C. § 864).[1]

We have previously dealt with that subject in *Jones* v. *United States*, 205 Ct. Cl. 270, 499 F. 2d 631 (1974), a court-martial case involving a single pay forfeiture of $40, unaccompanied by imprisonment or any other penalty. There we observed: "Plaintiff does not claim any unfairness or error in the proceedings, the findings, or the sentence—other than the use of the general system, prescribed by the Code, pivoting around the convening authority. Moreover, plaintiff does not ask for or desire a trial to show either that the use of this general system led to unjust or unfair proceedings or an unjust or unfair result in his particular case or that the general system has a tendency to lead to unfair or unjust proceedings or results. Nor has plaintiff given us any materials or information raising a triable issue as to either of those questions. We lack, in addition, relevant information as to the actual operation of the challenged Code provisions in this case, or generally. We are simply left with the bare provisions of the Uniform Code and asked to hold invalid any and every court-martial trial conducted under their aegis." *Ibid.* at 273–74, 499 F. 2d at 633 (footnote omitted). On that record we refused to hold Jones's court-martial invalid. At the same time we emphasized that we were deciding only the specific case before us, not "a case with a heavier sentence or a more detailed factual showing." *Ibid.* at 274, 499 F. 2d at 633.

Now we have two cases with heavier sentences but only a minimally more detailed factual showing. Both sides have moved for summary judgment. Like Jones, the present plaintiffs disavow any showing of actual command influence or unfairness in their particular cases.[2] Their major effort is to show that the general system has a tendency to lead to unfair

[1] Findings of not guilty cannot be overturned and the severity of the sentence cannot be increased (unless the prescribed sentence is mandatory). Art. 62(b), 10 U.S.C. § 862(b); Art. 63(b), 10 U.S.C. § 863(b).

[2] Plaintiffs do point out, however, that the majority of the court-martial members in McDonald's case, and all of the members in Sanders' case, were under the command of the respective convening authorities.

or unjust proceedings or results. This attempt consists mainly of five affidavits by three former Army Judge Advocate officers, one former Air Force officer-lawyer and one civilian lawyer who specialized in defending court-martial accuseds—none of the five was connected in any way with plaintiffs' cases or with the commands in which plaintiffs served—which either give broad conclusory statements of general unfairness or present a few specific episodes (wholly separate from plaintiffs' cases) which are recollected and interpreted by the affiants as showing unfair pressure or intervention by military superiors.[3] Plaintiffs also rely on some published general evaluations of the court-martial system by practitioners, legislators, and students.[4]

In response the Government has supplied affidavits by the two officers who were the legal advisors to the convening authorities in plaintiffs' cases, spelling out the steps in these cases and the methods of selection of the court-martial members and of trial and defense counsel.[5] The Government also filed two law review articles tending to support the general position that the court-martial system leads to fair trials and fair results.

With only these materials before us, we cannot say that the aspect of the Uniform Code which involves the convening authority in several steps of the court-martial process violates the Due Process Clause as applied to these two cases.[6] We stress again that there is no showing, or effort

[3] One of the affidavits is mainly concerned with military proceedings other than courts-martial governed by the Uniform Code.

[4] In addition, plaintiffs have filed an excerpt from a court-martial transcript which shows (in their view) that that particular defense counsel acted in a particular situation to help the command rather than the accused.

[5] Plaintiffs have moved to strike portions of these affidavits on the ground that, while each affidavit now reveals that the Staff Judge Advocate actually selected the court-martial members, the Government is estopped from so contending since the statute requires selection by the convening authority. We deny the motion because we do not read the affidavits as showing that the convening authority failed to choose the court-martial members, though he may have relied heavily on recommendations from others.

[6] Defendant challenges our jurisdiction to consider the merits at all, but *Schlesinger* v. *Councilman*, 420 U.S. 738, 744–53 (1975), upholds the right of civilian courts, including this one, to consider non-frivolous constitutional attacks on court-martial convictions which, if sustained, would render the convictions void. This is such a case.

to demonstrate, that the convening authority's role led to unfairness in these particular instances. The whole challenge is to the general system as *per se* invalid. But that historical scheme was deliberately continued by Congress (in the Uniform Code) over the strong suggestion that commanding officers be severed from significant involvement with the court-martial process. *See* Hansen, *Judicial Functions For the Commander?*, 41 MIL. L. REV. 1, 20–21 (1968). Congress chose instead, in 1950 and thereafter, to take account in other ways of the injurious impact of command influence. It provided for Courts of Military Review (formerly the Boards of Review) and an all-civilian Court of Military Appeals; Article 37(a), 10 U.S.C. § 837, is an across-the-board prohibition of command influence; Article 37(b), added in 1968, forbids consideration in promotion, assignment, transfer, etc., of the performance of duty by a serviceman as a court-martial member or of the zeal of any military defense counsel; Article 26(c), also added in 1968, provides that the military judge be designated by and responsible to the Judge Advocate General and that the convening authority cannot prepare any efficiency report on a military judge. *See also Gross* v. *United States*, *post* at 70. The Court of Military Appeals and the Courts of Military Review have rigorously enforced these and other strictures against command influence.[7] Even the opinion in *O'Callahan* v. *Parker*, 395 U.S. 258, 264 (1969), not favorable to the court-martial system, recognized the "strenuous efforts to eliminate the danger" of command influence.

In appraising this general aspect of the court-martial structure, we must heed the Supreme Court's recent instruction as to the differences between the civilian judicial system and the military scheme. *See Parker* v. *Levy*, 417 U.S. 733, 743–44, 749, 751, 756 (1974); *Schlesinger* v. *Councilman*, 420 U.S. 738, 746, 757–58 (1975). On the one hand, Congress

[7] The parties have between them cited a large number of such cases. Among those are: *Brookings* v. *Cullins*, 23 USCMA 216, 49 CMR 5 (1974); *United States* v. *Rosa*, 46 CMR 480 (1972); *United States* v. *McLaughlin*, 18 USCMA 61, 39 CMR 61 (1968); *United States* v. *Hicks*, 18 USCMA 38, 39 CMR 38 (1968); *United States* v. *Cole*, 17 USCMA 296, 38 CMR 94 (1967); *United States* v. *Wright*, 17 USCMA 110, 37 CMR 374 (1967); *United States* v. *Kitchen*, 12 USCMA 589, 31 CMR 175 (1961); *United States* v. *Hawthorne*, 7 USCMA 293, 22 CMR 83 (1956).

has greater powers over the court-martial system and in that connection can take account of the primary purpose of military forces to be ready to fight wars should the occasion arise. *Parker* v. *Levy*, *supra* at 743, 756; *Schlesinger* v. *Councilman*, *supra* at 757. On the other, Congress has been and should be concerned with ensuring fairness to servicemen. "In enacting the Uniform Code, Congress attempted to balance these military necessities against the equally significant interest of ensuring fairness to servicemen charged with military offenses, and to formulate a mechanism by which these often competing interests can be adjusted. * * *. [I]mplicit in the congressional scheme embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned tasks. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate the servicemen's constitutional rights." *Schlesinger* v. *Councilman*, *supra* at 757–58.

This teaching means to us that we cannot invalidate the convening authority's participation unless, at the least, we are convinced by a factual showing either that there was injustice in the particular case or that the current system has a decided and inherent tendency toward marked unfairness. The former is concededly absent here, and the showing of general unfairness attempted by plaintiffs is too weak to overcome the presumption in favor of the congressional choice. The Supreme Court said in *Parker* v. *Levy*, *supra* at 756: "For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." Under that standard we have not been persuaded by plaintiffs' arguments and generalized affidavits (and other materials) that Congress could not permissibly conclude that because of military exigencies—calling upon the commanding officer to decide which personnel are properly available for court-martial duty, and at what time—it is preferable to

keep the commanding officer in ultimate control of the appointment of court-martial members and the detailing of the trial and defense counsel and the military judge. Conversely, the Congress could rely on other mechanisms, including the independent Court of Military Appeals and its watchful eye, to ferret out and eliminate command influence in individual cases. *See also Gross* v. *United States*, *supra*. Plaintiffs cite some general conclusions that nevertheless command influence is inherent and pervasive. The opposite inference has been drawn by other knowledgeable authorities.[8] The matter is not so plain that we can take the extraordinary step of invalidating a basic foundation-stone of the congressionally ordained court-martial system.[9]

Of course we do not say that this is the only possible system or the best pattern. That is for Congress to decide. All we do and need say is that, on the materials proffered to us, we cannot hold that the current plan is so deficient or so unfair that it necessarily deprives court-martial accuseds, who are subject to conviction and imprisonment under it, of due process of law. *Cf. Withrow* v. *Larkin*, 421 U.S. 35, 46–47, 54–55, 58 (1975) (the combination of investigative and adjudicative functions does not, without more, constitute a due process violation as creating an unconstitutional risk of bias).

The defendant's motion for summary judgment is granted and the plaintiffs' motions for summary judgment are denied. The petitions are dismissed.

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[8] For instance, though the Task Force on the Administration of Military Justice in the Armed Forces reported the perceptions of many servicemen and some defense counsel that command control existed in general, it also reported that "such pressure has occurred from time to time, but it appears not to be pervasive." Report of the Task Force on the Administration of Military Justice in the Armed Forces, Vol. I, pp. 86–87.

[9] Plaintiffs invoke *DeChamplain* v. *Lovelace*, 510 F. 2d 419 (C.A. 8), *vacated as moot*, 421 U.S. 996 (1975), as holding that the convening authority is necessarily a biased official. However, in that opinion, which dealt with the serviceman's right to a hearing on pretrial release before a neutral military officer or military judge, the Court of Appeals said with respect to the convening authority: "We do not think that the responsibility of referring a case for trial to a court-martial in itself deprives the Convening Authority of the neutrality required by the Due Process Clause." 510 F. 2d at 426. *See also Wallis* v. *O'Kier*, 491 F. 2d 1323, 1325 (C.A. 10), *cert. denied*, 419 U.S. 901 (1974).

Syllabus

531 F. 2d 482

RODERICK RAY GROSS v. THE UNITED STATES

[No. 326–67. Decided February 18, 1976]

OPINION

Military pay; courts-martial; Uniform Code of Military Justice; constitutional challenges.—Plaintiff, a former Navy enlisted man, was tried by a general court-martial and found guilty on a charge of larceny in violation of Article 121 of the Uniform Code of Military Justice, he was sentenced to a bad conduct discharge with a reduction in grade, a fine of $1288.60, confinement at hard labor for 12 months, and additional confinement for up to 12 months until the fine was paid. The convening authority reduced the fine to $500 and the period of additional confinement to 6 months in event of nonpayment. A Navy Board of Review affirmed the findings and sentence as modified, the Court of Military Appeals denied review, and the Board for Correction of Naval Records rejected plaintiff's application for correction of his records. In this case before the court on a stipulation of facts, plaintiff seeks to recover pay and allowances, alleging that his conviction and sentence were void because of violations of his constitutional rights. It is *held* (1) that the issues presented are substantial constitutional issues deserving consideration, and on the record before the court it cannot be said that plaintiff's and his counsel's failure to raise the constitutional issues in the military system were knowing and deliberate; (2) that the evidence supports a finding of larceny beyond a reasonable doubt, and that the "presumption" of plaintiff's guilt passes constitutional muster tested under the standards delineated by the Supreme Court; (3) that there was no coercion or negation of free will in the limited questioning by plaintiff's superior who was not a law enforcement officer, and who did not consider plaintiff a suspect; (4) that plaintiff's challenge to the court-martial's jurisdiction on the ground that the offense of which he was convicted was not service-connected may be disposed of by pointing out that *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), is not to be applied retroactively; and (5) that there is no justification for invalidating the present conviction where the staff legal officer acted well within the bounds of the safeguards provided by the Uniform Code of Military Justice. A plaintiff in this court must make some showing, not merely an allegation, that the staff legal officer's fulfillment of his advisory functions led to unfairness or that the system is inherently unfair. Since none of the issues raised by plaintiff infringes a constitutional right, plaintiff is not entitled to recover, and the petition is dismissed.

Syllabus

Pleading and practice; standing to sue; challenge to constitutionality of contingent sentence; court-martial.

[1] Where a serviceman paid the fine imposed by the court-martial and accordingly did not have to serve any portion of the additional term of confinement contingent upon nonpayment of the fine, he has no standing to challenge the constitutionality of the inclusion of the contingent sentence since he suffered no injury therefrom.

Constitutional Law ⇐ 42.1(3)

Military pay; administrative remedies; failure to exhaust.

[2] As a general rule, a plaintiff must exhaust military remedies before he can obtain collateral review in this or any civilian court; however, constitutional rights are ordinarily treated as waived only if the Government shows that they were by-passed knowingly and deliberately.

Constitutional Law ⇐ 43.1

Armed Services ⇐ 47.1(1)

Constitutional law; due process of law—Fifth Amendment; presumption of guilt.

[3] An inference that a custodian has stolen entrusted property which may be drawn from his failure to account for or deliver the same at the time an accounting or delivery is required satisfies due process if it satisfies the reasonable-doubt standard—that is, if the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt.

Constitutional Law ⇐ 266(7)

Court of Claims jurisdiction; military pay claim; court-martial; review of by court.

[4] The Court of Claims may not review a serviceman's challenge, based alone on Article 31 of the Uniform Code of Military Justice because such challenge would address a mere error of law.

Armed Services ⇐ 47.1(2)

Evidence; admissibility of confession; retroactivity of *Miranda* v. *Arizona*.

[5] *Miranda* v. *Arizona*, 384 U.S. 436 (1966), which sets down guidelines for admissibility of evidence, is not retroactive and is inapplicable to a court-martial that took place in 1961.

Courts ⇐ 100(1)

Constitutional law; self-incrimination—Fifth Amendment; Uniform Code of Military Justice.

[6] The subjective pressure a military man may have felt when questioned by a superior officer in the presence of another superior after initial search of the man's storekeeping records is not sufficient in itself to render his responses to questions involuntary and violative of his constitutional rights. Unlawful pressure need not be inferred where the statements are the product of the sense of duty

of an adult who is not in custody and is not a suspect. Article 31 of the Uniform Code of Military Justice limits application of its special requirements to the questioning of a person suspected of an offense.

Armed Services ⇐ 47(3)

Military pay; court-martial jurisdiction; requirement that offense be service-connected; retroactivity.

[7] The decision in *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), that is, to be under military jurisdiction a crime must be service-connected, does not apply retroactively to court-martial convictions occurring prior to June 2, 1969.

Courts ⇐ 100(1)

Military pay; courts-martial; Uniform Code of Military Justice; convening authority's/staff legal officer's powers.

[8] The court will not invalidate a court-martial conviction on the basis of an allegation that the review and approval of the serviceman's conviction and sentence was by the staff legal officer who initially recommended court-martial for the crime, absent proof particular to the case or some general demonstration of the injurious impact of the provisions of the Uniform Code of Military Justice, that the safeguards embodied therein are inadequate to protect against any improper action by the staff legal officer who merely advises on the law and can himself exert no command influence on the court-martial and who, in the present case, acted well within the bounds of the system, and where all requirements of the system carefully devised by Congress and approved generally by the Supreme Court have been met.

Armed Services ⇐ 47.1(1)

Military pay; courts-martial; constitutional violation.

[9] The court must be certain that an infirmity rises to the level of a constitutional violation before considering voiding a court-martial conviction.

Armed Services ⇐ 47.1(1)

Robert H. Reiter, attorney of record, for plaintiff. *Spaulding, Reiter & Rose*, of counsel.

LeRoy Southmayd, Jr., with whom was *Assistant Attorney General Rex E. Lee*, for defendant. *Christopher H. Mills, of counsel.*

Before COWEN, *Chief Judge*, DAVIS, and KUNZIG *Judges*.

DAVIS, *Judge*, delivered the opinion of the court:

In 1960 plaintiff, a Ship's Serviceman Second Class in the United States Navy, served as storekeeper of the Special Order Store (*i.e.* shop for the purchase of foreign goods)

on the *USS Forrestal* during that vessel's Mediterranean cruise. The special order procedure required plaintiff to collect the purchase money and complete an order form in triplicate for each order placed, to give the customer the original of the order form as a receipt, to record each transaction in his order taker's log, and to turn over the money collected and the retained copies of the order forms to the Sales Officer at the end of each day. The customer obtained his merchandise by presenting his original of the order form, to be matched up with a retained copy, when the merchandise arrived. After the termination of the Mediterranean cruise and of the special order operation, certain irregularities in that process came to light; six servicemen presented originals of order forms which had not been recorded in the order taker's log, which did not match any retained copies of order forms, and for which no money had been given the Sales Officer. The unrecorded order forms, for which the servicemen received merchandise and/or refunds out of Sales Office funds, evidenced transactions totaling $1288.60.

After the completion of an investigation, plaintiff was tried by general court-martial on the alternative charges of larceny of $1288.60 in violation of Article 121 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 921, and delinquency in the performance of his duties, in negligently failing to account for $1288.60, in violation of Article 92 of the UCMJ, 10 U.S.C. § 892. The court-martial found him guilty of the former and not guilty of the latter and sentenced him to a bad conduct discharge, reduction to the grade of ship's serviceman seaman recruit, a fine of $1288.60, confinement at hard labor for twelve months, and additional confinement for up to twelve months until the fine was paid. Pursuant to his authority under Article 64 of the UCMJ, 10 U.S.C. § 864, the convening authority reduced the fine to $500 and the maximum period of further confinement in the event of nonpayment of the fine to six months. A Navy Board of Review affirmed the findings and sentence as modified; the Court of Military Appeals denied a petition for grant of review; the Board for Correction of

Naval Records rejected plaintiff's application for correction of his military records.

In a suit brought under 28 U.S.C. §§ 1491 and 1495 and now before us on a stipulation of facts,[1] plaintiff seeks to recover pay and allowances, alleging that his conviction and sentence were void because of violations of his constitutional rights. He claims: (1) His conviction was based on an unconstitutional presumption; (2) the admission of incriminatory statements made by him to a superior officer violated his fifth amendment rights; (3) the court-martial lacked jurisdiction under *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), because the money taken was not government property and the merchandise ordered was nonmilitary; (4) the review and approval of the larceny conviction and sentence by the staff legal officer who recommended court-martial for larceny (despite a contrary recommendation by the formal board of investigation) violated due process; and (5) the inclusion in the sentence of an additional term of confinement for nonpayment of the fine violated the eighth amendment. The fifth issue is not actually in this case at all. Plaintiff paid the fine and did not have to serve any portion of the additional term. Therefore, he suffered no injury from and has no standing to challenge the contingent sentence for nonpayment. *See generally Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 217–23 (1974); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 450–58 (1970). We shall deal *seriatim* with plaintiff's four remaining contentions but first consider the Government's argument that we cannot review any of the plaintiff's allegations.

1. The Government asserts that the plaintiff waived collateral review when he failed to raise his constitutional claims in the military proceedings. As a general rule, a plaintiff must exhaust military remedies before he can obtain collateral review in this or any civilian court. *See Noyd* v. *Bond*, 395 U.S. 683, 693–94 (1969); *Gusik* v. *Schilder*, 340 U.S. 128, 131–32 (1950); *Angle* v. *Laird*, 429 F. 2d 892, 894 (10th Cir. 1970), *cert. denied*, 401 U.S. 918 (1971); *Artis* v.

[1] The pertinent facts are sufficiently stated in this opinion.

United States, 205 Ct. Cl. 732, 737–39, 506 F. 2d 1387, 1389–90 (1974); *Hagarty* v. *United States*, 196 Ct. Cl. 66, 74, 449 F. 2d 352, 355 (1971). This general rule of exhaustion does not in itself bar Gross's suit; he sought review from all military courts and boards that could have reviewed his case. The more specific rule urged by the Government—that a plaintiff cannot raise on collateral review an issue not presented in the military fora—finds support in several Tenth Circuit cases and one from the Eighth Circuit. *See King* v. *Moseley*, 430 F. 2d 732, 735 (10th Cir. 1970); *McKinney* v. *Warden*, 273 F. 2d 643, 644 (10th Cir. 1959), *cert. denied*, 363 U.S. 816 (1960); *Suttles* v. *Davis*, 215 F. 2d 760, 763 (10th Cir.), *cert. denied*, 348 U.S. 903 (1954); *Harris* v. *Ciccone*, 417 F. 2d 479, 484 (8th Cir. 1969), *cert. denied*, 397 U.S. 1078 (1970). *But see Kauffman* v. *Secretary of the Air Force*, 415 F. 2d 991, 996–97 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970); *Gibbs* v. *Blackwell*, 354 F. 2d 469, 471–72 (5th Cir. 1965). We need not decide in this case whether this issue-waiver rule should normally be applied in this court to constitutional challenges. Plaintiff's military counsel, especially his appellate counsel,[2] neither represented plaintiff vigorously nor demonstrated an awareness of possible constitutional arguments, and the issues presented here are substantial constitutional issues which deserve consideration. *Cf. Kauffman* v. *Secretary of the Air Force*, *supra; Gibbs* v. *Blackwell*, *supra*. Constitutional rights are ordinarily treated as waived only if the Government shows that they were bypassed knowingly and deliberately. *See Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966); *Henry* v. *Mississippi*, 379 U.S. 443, 449–52 (1965). On the record before us we cannot say that plaintiff's (and his counsel's) failures to raise his constitutional issues were knowing and deliberate. Moreover, since we resolve the constitutional issues against the plaintiff, we need not con-

[2] Plaintiff's appellate counsel first requested an enlargement of time in which to file pleadings, on the ground that his heavy caseload would prevent him from properly representing plaintiff if he had to file pleadings within the prescribed 11 days. Thereafter, the appellate counsel filed only a cursory "Petition for Remission of Punitive Discharge." Gross's petition for review by the Court of Military Appeals was simply a form, the blanks of which were filled in by Gross, unaccompanied by any specifications of errors or other material indicating review of the record and advice by counsel. *See* Defendant's Exhibit 4 at 19, 16–17, 5.

front the waiver issue as we would have to do before we could grant relief to a plaintiff who possessed valid constitutional claims but had not raised them in the military tribunals. *Cf. Brooks* v. *Dewar*, 313 U.S. 354, 359–60 (1941); *Monett* v. *United States*, 190 Ct. Cl. 1, 4–5, 419 F. 2d 434, 435–36 (1969), *cert. denied*, 400 U.S. 846 (1970); *Jones* v. *United States*, 205 Ct. Cl. 270, 499 F. 2d 631 (1974).

2. In alleging that he is entitled to back pay because his conviction resulted from the application of an unconstitutional presumption of embezzlement based on custody of and inability to account for funds, plaintiff relies heavily on our decision in *Shaw* v. *United States*, 174 Ct. Cl. 899, 357 F. 2d 949 (1966), *confirmed sub nom. after remand*, *Gearinger* v. *United States*, 188 Ct. Cl. 512, 516–17, 412 F. 2d 862, 864–65 (1969), in which we granted back pay to a serviceman whose court-martial conviction was premised solely on a presumption of embezzlement where the prosecution proved only a shortage in the funds for which the accused was responsible. Plaintiff's invocation of *Shaw* is misplaced. There the prosecution proved only a shortage in Shaw's funds; the burden then shifted to Shaw, not only to disprove his own fault and negligence, but also to prove affirmatively theft by another or loss through other circumstances beyond his control (*e.g.* fire). As the Government acknowledged, there was no evidence to support a finding of negligence or of conversion by Shaw, and there was a great deal of evidence of Shaw's due care. Shaw clearly was convicted of embezzlement solely on the basis of the shortage in his funds combined with the presumption placing on him the burden to prove the actual cause of the shortage. *Shaw* v. *United States*, *supra* at 908–09, 915–16, 357 F. 2d at 955–56, 960; *see O'Malley* v. *United States*, 378 F. 2d 401, 403 (1st Cir.), *cert. denied*, 389 U.S. 1008 (1967).

Gross's case stands on very different footing. No burden, other than that which naturally arises from an accumulation of evidence against an accused, was placed on Gross, and the prosecution presented a great deal of circumstantial evidence probative of his guilt. Gross's acquittal on the negligence charge does not equate with the affirmative finding that Shaw was not negligent; Gross's court-martial had been instructed

that it could not convict on both charges, so the acquittal on the lesser charge was the necessary consequence of the conviction on the greater. Further, the law officer at Gross's court-martial resisted the prosecution's attempt to place on Gross the burden to explain (Court-Martial Appellate Exhibit 3 at 1, Defendant's Exhibit 4 at 398) and carefully limited the "presumption" in his instruction:

> The existence of the *intent to steal* ordinarily cannot be proved by direct evidence unless, for example, the accused has been overheard to express that intent; but you are advised that intent may be proved by facts and circumstances from which, alone or in connection with other facts, you may, after applying your common sense and your general knowledge of human nature and the ordinary affairs of life, reasonably infer the existence of such an intent. Thus, it may be justifiably inferred that one who has assumed the custody of the property of another has stolen such property if he does not or cannot account for or deliver it at the time an accounting or delivery is required. However, the *inference* which may be drawn from a custodian's failure to account for or deliver entrusted property at the time an accounting or delivery is required *is not mandatory*, and *it can be rejected or accepted as you see fit.*

Transcript of Court-Martial at 113, Defendant's Exhibit 4 at 346 (emphasis added).

This instruction, similar to ones we noted with approval in *Shaw* (174 Ct. Cl. at 918–19, 357 F. 2d at 962), states a permissive inference the constitutionality of which must be tested under standards delineated by the Supreme Court. Under the most stringent formulation of the test, an inference satisfies due process if it satisfies the reasonable-doubt standard—that is, if "the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt." *Barnes* v. *United States*, 412 U.S. 837, 843 (1973). *See generally id.* at 841–47 and cases cited. Following the example of the Supreme Court in *Barnes* (*cf. id.* at 845–46), we have reviewed the evidence against Gross. The prosecution proved, *inter alia*, that Gross had signed all the unrecorded forms, that at least one unrecorded order had been placed late in the evening just before the store closed and just before Gross was to record the day's trans-

actions in his log and turn in the money, that on three of the six unrecorded order forms there was no serial number (contrary to the normal practice), while on the other three the numbers duplicated those given on recorded orders, that no orders and money were "lost" during the periods when Gross had an assistant in the store, that Gross had a safe in the special order store, that only Gross handled the money until it was given to the Sales Officer or the Sales Officer's assistant, that the Sales Officer's assistant gave Gross a receipt when Gross gave him the money, and that the Sales Officer's log matched Gross's log, which Gross completed before he gave orders and money to the Sales Officer. We conclude that this evidence supported a finding of larceny beyond a reasonable doubt. The "presumption" passes constitutional muster.

3. The second challenge, directed against the admission into evidence of certain incriminatory statements, must also fail. In contending that the circumstances under which he made the statements negatived his free will, plaintiff in effect acknowledges that their admission violated his constitutional rights only if the statements were involuntary.[3] *See, e.g., Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1961); *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 963 (1966). Although "voluntariness" is not a test easily applied or one providing quick and absolute answers to questions of admissibility, our examination of the circumstances surrounding Gross's statements and of other cases dealing with voluntariness leads to the certain conclusion that the challenged statements were admissible. A superior officer, Chief Scarselletta, called Gross into his office after the former had received the first unrecorded order form and had conducted an unsuccessful search for a matching retained copy and an entry in Gross's log. In the presence of another officer, Scar-

[3] Although plaintiff's formulation of the question is confusing, we do not read his argument as a contention that the admission of the statements violated either Article 31 of the UCMJ (10 U.S.C. § 831) or *Miranda* v. *Arizona*, 384 U.S. 436, 444–45, 478–79 (1966). We could not review a challenge based on Article 31 alone because such a challenge would address a mere error of law. *Narum* v. *United States*, 151 Ct. Cl. 312, 315, 287 F. 2d 897, 898–99 (1960), *cert. denied*, 368 U.S. 848 (1961). Plaintiff could not found a challenge on *Miranda* because *Miranda* is not retroactive (*Johnson* v. *New Jersey*, 384 U.S. 719, 721, 732 (1966)) and therefore does not apply to a court-martial that took place in 1961.

selletta asked Gross a few questions, in response to which Gross acknowledged that the signature on the unrecorded form was his, declined to double-check his log, said he guessed that he had "fouled up," and offered to pay the deficit. We perceive no coercion or negation of free will in this simple and limited questioning by one who was not a law enforcement officer and who did not consider Gross a suspect,[4] at a time when only the first clue of possible wrongdoing had come to light. Nor have we found any decision that would support plaintiff's allegation that his statements were not the product of his free will; the cases focus on unfair tactics of police officers, the degree and duration of external pressure on the suspect or accused, and the capacity of the suspect or accused to resist pressure. *See Miranda* v. *Arizona*, 384 U.S. 436, 507–09 (1966) (Harlan, J., dissenting); *Culombe* v. *Connecticut*, *supra* at 601–02, 622–31; *Pea* v. *United States*, 397 F. 2d 627, 632–34 (D.C. Cir. 1967); 3 J. WIGMORE, EVIDENCE § 826, at 352–54 & n.11 (rev. ed. 1970); *Developments in the Law—Confessions*, *supra* at 962–84. The subjective pressure Gross may have felt when questioned by a superior officer in the presence of another superior is not sufficient in itself to render the statements involuntary. Unlawful pressure need not be inferred where the statements are the product of the sense of duty of an adult who is not in custody and is not a suspect. *See Pea* v. *United States*, *supra* at 634. Even Article 31 of the UCMJ, 10 U.S.C. § 831, which has long contained special provisions designed to protect servicemen from the pressure inherent in the military situation (*see Developments in the Law—Confessions*, *supra* at 1086–87), limits the application of its special requirements to the questioning of "a person suspected of an offense."

4. Relying on *O'Callahan* v. *Parker*, 395 U.S. 258, 272, 274 (1969), plaintiff disputes the jurisdiction of the court-martial on the ground that the offense of which he was convicted was not service-connected. We can bypass the question

[4] In his carefully probed testimony accepted by the law officer, Scarselletta emphatically stated that he did not suspect Gross when he called Gross in for questioning. Scarselletta had a high regard for Gross and had recommended Gross for the storekeeper's job. Court-Martial Appellate Exhibit 1 at 4–16, Defendant's Exhibit 4 at 383–95; Transcript of Court-Martial at 25–28, Defendant's Exhibit 4 at 258–261.

whether there could be any doubt about the service connection of a crime committed on board a Navy ship outside the territorial limits of the United States by a serviceman who acted while engaged in his military duties and in transactions with other servicemen who subsequently received property or money from the Navy. The simplest dispositive point is that *O'Callahan* is not to be applied retroactively. *See Gosa* v. *Mayden*, 413 U.S. 665 (1973); *Augenblick* v. *United States*, 206 Ct. Cl. 74, 78–92, 509 F. 2d 1157, 1159 (1975), *cert. denied*, 422 U.S. 1007 (1975).

5. The last issue, an allegation that the review and approval of the conviction and sentence by the staff legal officer who initially recommended court-martial for larceny violated due process, is similar to the question in *McDonald & Sanders* v. *United States*, *ante* at 62, decided today. Gross does not contend that this staff legal officer was actually biased but instead simply urges us to declare the conviction void because he might conceivably have been biased. In *McDonald & Sanders*, *supra*, and in *Jones* v. *United States*, 205 Ct. Cl. 270, 499 F. 2d 631 (1974), we held that we would not assume unfairness or prejudice to a court-martial defendant from the mere existence of a legislative system giving the convening authority multiple roles, including roles as referrer of charges, selector of the trial and defense counsel and of the court-martial members, and reviewer of conviction and sentence. The reasons for our refusal to assume prejudicial effect are stronger in this case, where plaintiff has challenged not the convening authority's position but that of the staff legal officer who merely advised the convening authority on the law at two important stages of the court-martial proceedings. Congress, which at least twice has given serious consideration to complaints about command influence and the convening authority's roles but has not noted any complaints about the staff legal officer's or judge advocate's functions, has incorporated into the UCMJ safeguards designed to protect the rights of suspects and accuseds, especially from the prejudicial exercises of command influence by the convening officer. *See*, *e.g.*, 10 U.S.C. §§ 806(b), (c) (convening authorities shall communicate with staff judge advocate or legal officer on matters relating

to military justice; one who played a role in investigation or trial may not later serve as staff judge advocate or legal officer to reviewing authority); *id.* §§ 825(c)(1), (d)(2) (convening authority must appoint to the court those who are best qualified for the duty and may not appoint any interested person or participant; accused may request that general or special court-martial include enlisted members); *id.* § 827 (limitations on whom convening authority may detail as counsel in general or special court-martial); *id.* § 831 (prohibition of compulsory self-incrimination and exclusionary rule); *id.* § 832(a) (a thorough and impartial investigation must be conducted before any charge is referred to a general court-martial); *id.* § 834(a) (convening authority shall refer charge to be tried by general court-martial to staff judge advocate or legal officer for advice before directing trial); *id.* § 837 (no one may take action that would influence action of court or punish court members or counsel for actions); *id.* § 854 (record must be kept, and a copy of each special or general court-martial record must be given the accused as soon as authenticated); *id.* § 861 (after receiving general court-martial record for review convening authority must refer it to his staff judge advocate or legal officer for an opinion); *id.* §§ 862–64 (on review, convening authority may not enlarge conviction or sentence and may not order a case reconsidered or reheard for the purpose of altering any finding of not guilty or enlarging sentence); *id.* §§ 865(b), 866 (b), (c), (review by Court of Military Review; mandatory in cases involving certain officers or certain levels of punishment); *id.* §§ 867 (b)–(d) (review by Court of Military Appeals); *id.* § 898 (failure to comply with or enforce a procedural rule is a punishable offense); S. REP. No. 1601, 90th Cong., 2d Sess. (1968), *in* 1968 U.S. CODE CONG. & ADMIN. NEWS 4501, 4502, 4503–04, 4509 (Congress strengthened section 837 prohibition of influencing action of court, but did not change provisions relating to review of record); S. REP. No. 486, 81st Cong., 2d Sess. (1950), *in* 1950 U.S. CODE CONG. & ADMIN. NEWS 2222, 2227 (those who attacked command influence focused on the dangers inherent in the authority to appoint the members of the court and conceded that the commander

should have the right to refer charges, select counsel, and review the case after trial; Congress believed that the safeguards built into the system would adequately protect servicemen).

We cannot say, in the absence of proof particular to this case or some general demonstration of the injurious impact of the provisions, that these safeguards are inadequate to protect against any improper action by the staff legal officer, who merely advises on the law and can himself exert no command influence on the court-martial. We therefore have no justification in this case for invalidating a conviction where the staff legal officer acted well within the bounds of the system containing these safeguards; without far greater proof than plaintiff has proffered, we cannot invalidate a conviction where all requirements of a statutory system carefully devised by Congress and approved generally by the Supreme Court were met. *McDonald & Sanders* v. *United States*, *supra; see Schlesinger* v. *Councilman*, 420 U.S. 738, 757–58 (1975); *Burns* v. *Wilson*, 346 U.S. 137, 140–41 (1953); S. REP. No. 486, *supra*. *See also United States* v. *Augenblick*, 393 U.S. 348, 356 (1969), which indicates that we must be certain that an infirmity rises to the level of a constitutional violation before we consider voiding a court-martial conviction. A plaintiff in this court must make some showing, not merely an allegation, that the staff legal officer's fulfillment of his advisory functions led to unfairness or that the system is inherently unfair. *McDonald & Sanders* v. *United States*, *supra; cf. Gallagher* v. *United States*, 191 Ct. Cl. 546, 556–58, 423 F. 2d 1371, 1377–78, *cert. denied*, 400 U.S. 849 (1970) (mere assertion of conflict of interest is insufficient); *Flackman* v. *Hunter*, 75 F. Supp. 871, 877–78 (D. Kan. 1948), *appeal dismissed*, 173 F. 2d 899 (10th Cir. 1949) (summary rejection of contention that dual role of staff judge advocate under Articles of War violated due process).[5]

In accordance with our conclusion that none of the issues raised by plaintiff infringes a constitutional right, we hold

[5] Likewise relevant is *Withrow* v. *Larkin*, 421 U.S. 35, 46–47, 54–55, 58 (1975), refusing to hold that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication (the agency involved was a state examining board for physicians).

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for the defendant, decide that plaintiff is not entitled to recover, and dismiss the petition.

CONCLUSION OF LAW

For these reasons, it is held that the plaintiff is not entitled to recover and his petition is dismissed.

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530 F. 2d 322

UNION PACIFIC RAILROAD COMPANY v. THE UNITED STATES

[No. 688-71. Decided February 18, 1976]

ON THE PROOFS

Carriers; rates, fares and charges; classification of goods; grained ammonium nitrate.—Plaintiff seeks additional compensation for freight transportation services on shipments for the Government of grained ammonium nitrate used in the manufacture of bombs. Plaintiff billed the shipments on the basis of a freight rate determined under Item 22400 under the heading "Chemicals" of the Uniform Freight Classification. After payment to plaintiff, the General Accounting Office asserted overcharges, claiming that the goods should have been rated under tariffs applicable to fertilizer and fertilizer materials. Defendant recouped the amounts of the alleged overcharges from sums due plaintiff for other freight transportation services. It is *held* that defendant erred; the record evidence shows that the shipments of *grained* ammonium nitrate involved here cannot reasonably be classified as fertilizer or fertilizer materials. Plaintiff is entitled to recover and judgment is entered for plaintiff for $236,519.83.

Carriers; rates, fares and charges; tariff schedules; classification of freight.

[1] In determining the appropriate freight rate for shipments of ammonium nitrate, consideration must be given to the differences between the forms of dry ammonium nitrate, i.e. grained ammonium nitrate and prilled ammonium nitrate, the market price of the former being approximately double that of the latter, the former is a powdery substance whereas the latter consists of small round pellets, the former is more flammable and more easily exploded than the latter, and the former has a tendency to solidify during transportation or storage requiring repulverization for use whereas the latter does not have this tendency. The characteristics of the grained ammonium nitrate make its use as a fertilizer or fertilizer material unfeasible under ordinary circumstances, and argue against a freight rate applicable to fertilizers.

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Martin Sterenbuch, attorney of record, for plaintiff. *Gajarsa, Liss & Sterenbuch*, of counsel.

John Charles Ranney, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, and KUNZIG, *Judge*.

PER CURIAM: This case comes before the court on exceptions of the parties to the recommended decision of Senior Trial Judge Mastin G. White, filed March 25, 1975, pursuant to Rule 134(h), having been submitted on the briefs and oral argument of counsel. Upon consideration thereof, since the court agrees with the recommended decision, as hereinafter set forth*, it hereby affirms and adopts the same as the basis for its judgment in this case. It is, therefore, concluded that plaintiff is entitled to recover and judgment is entered for plaintiff against defendant in the sum of two hundred thirty-six thousand five hundred nineteen dollars and eighty-three cents ($236,519.83).

OPINION OF TRIAL JUDGE

WHITE, *Senior Trial Judge:* The plaintiff railroad company is requesting additional compensation for freight transportation services which it performed for the defendant during the 1968–72 period as the final and delivering carrier on carload shipments of grained ammonium nitrate originating at various points in the United States and destined for the Cornhusker Army Ammunition Plant ("Cornhusker"), Grand Island, Nebraska. The grained ammonium nitrate was procured by the defendant for use in the manufacture of bombs at Cornhusker. The bombs were loaded with Minol-2, an explosive which consists of 20 percent aluminum, 40 percent TNT, and 40 percent ammonium nitrate.

The plaintiff billed the defendant for the transportation services previously mentioned on the basis of a freight rate

*Whereas the court adopts the trial judge's separate findings of fact, which are set forth in his opinion filed March 25, 1975, they are not printed herein since such facts as are necessary to the decision are contained in his opinion.

determined for the respective shipments under Item 22400 of the Uniform Freight Classification ("UFC").[1] This item appears under the generic heading of "Chemicals" and covers "Ammonium Nitrate, in bags, barrels or boxes; also CL [carload], in bulk in paper lined cars."

In accordance with 49 U.S.C. § 66, the plaintiff's bills for the transportation of the grained ammonium nitrate were duly paid by the defendant. Subsequently, however, the defendant (acting through the General Accounting Office) determined that the plaintiff's bills involved overcharges; and the defendant recouped the amounts of such alleged overcharges by making deductions from sums admittedly due the plaintiff in connection with transportation services performed for the defendant on other commodities. It was the defendant's conclusion that the shipments of grained ammonium nitrate should have been rated under listings of "ammonium nitrate" which appear in various commodity tariffs applicable to "fertilizer and fertilizer materials."

It is my opinion that the defendant's action with respect to the alleged overcharges was erroneous, because the evidence in the record shows that *grained* ammonium nitrate cannot reasonably be classified as a fertilizer or a fertilizer material.

Dry ammonium nitrate is commercially produced and sold in two forms: as grained ammonium nitrate and as prilled ammonium nitrate (*i.e.*, in the form of prills, or small round pellets). The manufacturing processes used in the production of the two types of ammonium nitrate are quite different.

Although the chemical projerties of the two types of dry ammonium nitrate are identical, there are differences between the two types that are significant from the standpoint of the present litigation:

(1) The market purchase price of grained ammonium nitrate is approximately double the market purchase price of prilled ammonium nitrate.

(2) A particle of grained ammonium nitrate is about 1/25th the size of an ammonium nitrate prill, so that grained ammonium nitrate is a powdery substance of fine particles.

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[1] In some instances, the plaintiff based its charges on lower Section 22 quotations or "Freight All Kinds" tariffs.

(3) Grained ammonium nitrate is more flammable and more easily exploded than prilled ammonium nitrate.

(4) Because of the fineness and hydroscopicity of its particles, grained ammonium nitrate has a tendency to solidify into blocks or lumps during the course of transportation or storage, whereas prilled ammonium nitrate does not have this tendency.

When applied to the soil, grained ammonium nitrate and prilled ammonium nitrate have, basically, the same nutrient value for the promotion of plant growth. However, because of the characteristics of grained ammonium nitrate outlined in the preceding numbered paragraphs of this opinion, particularly the comparatively high cost of purchasing it and the difficulty involved in pulverizing the solidified blocks or lumps into a free-flowing material at the time of use, it is not feasible under ordinary circumstances to use grained ammonium nitrate as a fertilizer or fertilizer material.[2] Consequently, grained ammonium nitrate is not produced or sold for fertilizer use. Rather, it is produced and sold for use as a component of dynamite, explosives, and blasting agents.

On the other hand, prilled ammonium nitrate is commonly produced, sold, and used as a fertilizer,[3] either by itself as a single fertilizer or as part of a blended fertilizer that also contains phosphorus or potash, or both.

Therefore, the term "ammonium nitrate" appearing in commodity tariffs that are applicable to "fertilizer and fertilizer materials" undoubtedly includes prilled ammonium nitrate, but it cannot reasonably be construed as including *grained* ammonium nitrate. This being so, the defendant erred in the present case when it took the position that the fertilizer commodity tariffs were applicable to the shipments of grained ammonium nitrate involved here.

For the reasons previously stated in this opinion, the plaintiff is entitled to recover. In this connection, the parties have

[2] The only evidence in the record of instances when grained ammonium nitrate was actually used for fertilizing purposes involved extraordinary circumstances, including the furnishing of the material to the users free of charge (except for transportation costs).

[3] Prilled ammonium nitrate is also used sometimes as a component of blasting agents.

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previously stipulated that the amount due the plaintiff will be $236,519.83 in the event of a determination by the court that the fertilizer commodity tariffs are inapplicable. Accordingly, judgment should be entered for the plaintiff in the amount of $236,519.83.

CONCLUSION OF LAW

Upon the findings of fact and the foregoing opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover, and it is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of two hundred thirty-six thousand five hundred nineteen dollars and eighty-three cents ($236,519.83)

MADELINE C. HODGE v. THE UNITED STATES

[No. 229–72. Decided February 18, 1976]

ON THE PROOFS

Civilian pay; selection for promotion.—Plaintiff, a white employee of the Department of Housing and Urban Development in its Philadelphia Regional Office, sues to recover the difference between the salary of the position of Chief, Social Services Branch, GS–13, and that paid her as a GS–12 employee, for the period commencing January 14, 1969 to date of judgment herein. Plaintiff, claiming racial discrimination, contends, *inter alia*, that HUD officials pre-selected a black for the GS–13 position, denying her the procedural guarantees of the merit staffing program, that there were procedural errors in the agency's review and processing of her grievance, and that the Civil Service Commission acted arbitrarily and capriciously in failing to correct erroneous agency action. It is *held* that the record fails to substantiate plaintiff's claims of racial discrimination and pre-selection or to show any arbitrary, capricious or unlawful action by defendant's officers or employees during the administrative process culminating in selection of another as the best-qualified for the GS–13 position. Plaintiff is not entitled to recover and the petition is dismissed.

Civilian pay; promotion; failure to promote.

[1] Where the record shows that at least three negative recommendations concerning plaintiff's possible selection for the subject GS–13 position were presented to the ad hoc panel set up to screen

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and rate well-qualified candidates for the position and that it was the unanimous decision of the panel based on review of the personnel folders of the two well-qualified candidates including their experience, education, work performance, awards and supervisory skill or potential, that plaintiff's name should not be placed on the best-qualified list and that the other candidate "D's" name should, and where the record does not establish that the panel's decision was the result of any preselection of D, that plaintiff was in any way denied fair and proper consideration in the selection process, that any violation of her procedural or regulatory rights occurred, or that the panel's judgments were affected by racial considerations, the charges of arbitrary, capricious or unlawful actions on defendant's part are not sustainable.

United States ⇐ 11.7

Civilian pay; promotion; selection for promotion.

[2] Where the record establishes that there was no material breach of the agency Handbook pertaining to informing employees regarding merit staffing, that neither para. 17 of the Handbook nor the relevant paragraph of the Federal Personnel Manual pertaining to referral of candidates to the selecting official was violated by the placement of a single name on the best-qualified list, that consideration of outside candidates was not unlawful, and where the record does not show that the ad hoc panel determination that plaintiff was not entitled to placement on the best-qualified list was erroneous as a matter of law or violative of any of plaintiff's regulatory rights, it cannot be said that defendant's officers acted arbitrarily, capriciously or contrary to law or regulation in the administrative process in the selection of the best-qualified candidate over plaintiff for the subject GS–13 position.

United States ⇐ 11.7

Civilian pay; promotion; selection for promotion; agency discretion.

[3] The decision of the Civil Service Commission not to move plaintiff to the certificate of eligibles for the subject GS–13 position when the second-listed candidate of the six listed was removed, was a permissible one since under regulations the agency was required to make its selection from among the top three interested available persons on the certificate and the agency selected the previously listed fourth candidate following declinations from the higher-rated selectees.

United States ⇐ 11.7

Civilian pay; hearings; agency level hearings; burden of proceeding.

[4] Although agency representatives interviewed certain witnesses, ultimately called by plaintiff, for purpose of preparing the agency's case relating to the consolidated racial discrimination complaint and the grievance complaint asserting violation of HUD personnel policy merit staffing regulations in the filling of the subject GS–13 position, the mere interviewing of witnesses does not amount to a

denial of a full and fair hearing, nor is it unlawful administrative action denying procedural rights. Under such circumstances, the hearing officer's ruling that the burden of going forward rested with plaintiff was not an abuse of discretion, arbitrary or capricious or prejudicial to plaintiff.

United States ⇐ 11.7

Civilian pay; hearings; agency level hearing; ex parte communication.

[5] Where, during the agency hearing, plaintiff testified that she had contacted the Civil Service Commission and obtained information that candidates could not be selected unless they were within reach at the time of the selection, and the hearing officer thereupon stated that he felt that the testimony had not brought out all of the pertinent facts and that he wanted to feel free to contact plaintiff's source himself and did so, such ex parte communication was not prejudicial to plaintiff, does not amount to a vitiating defect, and was at worst harmless error.

United States ⇐ 11.7

John I. Heise, Jr., attorney of record, for plaintiff.

LeRoy Southmayd, Jr., with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DAVIS and KASHIWA, *Judges*.

PER CURIAM: This case comes before the court on plaintiff's exceptions to the recommended decision of Trial Judge Harry E. Wood, filed February 20, 1975, pursuant to Rule 134(h), having been submitted on the briefs and oral argument of counsel. Upon consideration thereof, since the court agrees with the trial judge's recommended decision, as hereinafter set forth, it hereby affirms and adopts the decision as the basis for its judgment in this case. It is, therefore, concluded that plaintiff is not entitled to recover and plaintiff's petition is dismissed.

OPINION OF TRIAL JUDGE

WOOD, *Trial Judge:* In this action, plaintiff, a classified Civil Service employee with over 24 years of service, sues to recover the difference between the salary of the position of Chief, Social Services Branch, grade GS-13, Housing Assistance Office, Region II (Philadelphia, Pennsylvania),

Department of Housing and Urban Development ("HUD"), and that paid to her as a grade GS–12 employee of HUD for the period commencing January 14, 1969, and extending to the date of judgment herein.

The principal basis for plaintiff's claim is asserted racial discrimination in the filling of the position of Chief, Social Services Branch. Plaintiff, who is white, contends that HUD officials "pre-selected" a black for the grade GS–13 position, denying her "the procedural guarantees of the merit staffing program"; that the "processing for selection was erroneously conducted * * * to cover up the pre-selection and to discriminate against [plaintiff]"; that there were procedural errors in the agency's review and processing of plaintiff's "grievance"; and that the Civil Service Commission ("CSC") acted arbitrarily and capriciously in failing to correct erroneous agency action. Defendant vigorously controverts these contentions.

The relevant facts are detailed at length in the accompanying findings of fact. To restate them in this opinion would serve no useful purpose, and would unduly lengthen a report already unavoidably long. It suffices to say that, as set forth in the ultimate findings and conclusions, the record fails to substantiate plaintiff's claims of racial discrimination and pre-selection. See, in this connection, *Grover* v. *United States*, 200 Ct. Cl. 337 (1973); *Haynes* v. *United States*, 190 Ct. Cl. 9, 418 F. 2d 1380 (1969).

Nor does the record show any arbitrary, capricious, or unlawful action by defendant's officers or employees during the administrative process culminating in the selection of another person for the position of Chief, Social Services Branch. *Id.* While plaintiff was undeniably well-qualified for that position, and appropriate officials of Region II, HUD, so found, the determination that she was not "best-qualified" is here impervious to attack. See *Hirsch* v. *United States*, 205 Ct. Cl. 256, 499 F. 2d 1248 (1974); *Grover* v. *United States*, *supra*.

Other arguments advanced by plaintiff have carefully been considered. Those arguments, too, are treated in the ultimate findings and conclusions. One aspect of the case, the failure of Mr. Carl L. Barnes, a veterans preference eligible

on the CSC Certificate of Eligibles for the position of Chief, Social Services Branch, to receive a telegram from Region II, HUD, and a purported memorandum of telephone call from Mr. Barnes indicating disinterest in that position, which in fact he did not make, are puzzling and on this record unexplained. There is no proper basis, however, for concluding that these matters confer on plaintiff any right to recover herein, since in any event she suffered no damage thereby.

Plaintiff's several assertions of error during the administrative hearing on her claim of racial discrimination are for the most part unfounded. The most serious charge, that of an "ex parte excursion" by the Hearing Officer, in violation of HUD regulations, is wholly unaccompanied by any showing of prejudice to plaintiff. Consequently, the administrative hearing process was clearly not fatally flawed by any actions on the part of the Hearing Officer. *Grover* v. *United States*, *supra*; *Haynes* v. *United States*, *supra*.

In short, plaintiff has failed to establish any arbitrary, capricious, or unlawful actions on the part of defendant, either in the process of selection for the position of Chief, Social Services Branch, grade GS–13, Region II, HUD, or in the administrative considerations of plaintiff's complaints concerning that selection process. Accordingly, it is concluded that plaintiff is not entitled to recover, and that her petition should be dismissed.

FINDINGS OF FACT

1. (a) Plaintiff, a white classified Civil Service employee with over 24 years of service, sues to recover the difference between the salary of the grade GS–13 position of Chief, Social Services Branch, Housing Assistance Office, Region II (Philadelphia, Pennsylvania), Department of Housing and Urban Development ("HUD"), and that paid to her as a grade GS–12 employee of HUD for the period commencing January 14, 1969, and extending to the date of judgment herein. Plaintiff contends that HUD officials "preselected" a black for the grade GS–13 position, denying her "the procedural guarantees of the merit staffing program"; that the "processing for selection was erroneously con-

ducted * * * to cover up the pre-selection and to discriminate against [plaintiff]"; that there were procedural errors in the agency's review and processing of plaintiff's "grievance"; and that the Civil Service Commission ("CSC") acted arbitrarily and capriciously in failing to correct erroneous agency action.

(b) Trial of this cause has been duly limited to the issues of law and fact relating to plaintiff's right to recover, reserving determination of the amount of recovery, if any, for further proceedings.

2. (a) On May 18, 1960, after prior civilian service within the Department of Defense in social services and armed forces recreation and welfare programs at military installations both within and without the United States, plaintiff was employed by the Chicago Region, Public Housing Administration ("PHA") as an Occupancy Specialist, grade GS–9. In April 1961, plaintiff was designated to establish an Office of Community and Social Services within the Chicago Region, PHA, and on October 31, 1961, she was promoted to grade GS–11. Plaintiff was responsible for all phases of the Social Services Program in the Chicago Region.

(b) On October 29, 1962, plaintiff was transferred to the Philadelphia Region, PHA, as a Community Services Officer, grade GS–11. She was promoted to Community Services Officer, grade GS–12, July 3, 1963. In 1965 the functions, powers, and duties of the PHA were transferred to HUD. From October 1962 to March 1969, plaintiff was in charge of the Philadelphia Region Social Services Office (or Branch), and was responsible for the Social Services Program in that region. Her position, during the period 1967–69, was that of Social Services Advisor, grade GS–12, Social Services Office (or Branch), Housing Assistance Office, Region II, HUD.

(c) At the time of trial of this case plaintiff was employed in the Camden, New Jersey, Area Office of HUD, in the position of Community Services Advisor, grade GS–12.

3. During the period here material, Chapter 335, Federal Personnel Manual, "Promotion and Internal Placement", provided in substance for the installation in an agency by the agency head of a merit promotion plan in order to conform to the requirements of the Federal Merit Promotion Program

in the filling of vacancies in the career Civil Service. Any such agency merit promotion program was required to provide, among other things, for selection from among the best of the qualified candidates for a position without discrimination among them for any reason such as sex, race, religion, or politics. "Concurrent" consideration of qualified individuals outside an agency who were known to be available, along with employees within the agency, for a particular vacancy was specifically authorized by Chapter 335. Chapter 335 also required the maintenance of clear records; provided that qualification standards and evaluation methods should be reasonable, applied with fairness and equity to all candidates, and designed to obtain the highest practicable degree of validity and reliability under the specific circumstances; and stated that when a promotion action did not conform "to the specified conditions of the governing plan, the employee must be removed from the position * * * unless the violation has been or can be corrected to conform to the conditions of the plan."

4. During the period here material, A HUD Handbook, 335.1, "Personnel Policy Merit Staffing", provided in part as follows:

CHAPTER I. HUD MERIT STAFFING POLICY

SECTION 1. INTRODUCTION

1. *Statement of Policy.* It is the policy of the Department of Housing and Urban Development to fill its positions with the *best-qualified* candidates. By establishing the HUD Merit Staffing Policy, the Department provides for the systematic selection of candidates to fill positions through promotion, reassignment or recruitment outside the Department. This policy will be administered in accordance with the standards and instructions of the United States Civil Service Commission and the principles and requirements of the Federal Merit Promotion Program. The policy affirms that there shall be no discriminations against individuals because of race, color * * *.

* * * * *

SECTION 2. ADMINISTRATION OF THE POLICY

* * * * *

Findings of Fact

5. *Responsibility of Primary Personnel Components.* The primary personnel components (i.e. * * * the personnel offices in each HUD Regional Office) are those servicing * * * each Regional Administrator. They are responsible for conducting personnel operations in conformity with the requirements of the Merit Staffing Policy, and for informing and advising employees regarding it. They are further responsible for maintaining lists of vacancies together with information regarding the qualifications required for eligibility. Vacancy lists and information on qualifications are to be available for review by employees.
6. *Responsibility of Supervisors.* The active interest and involvement of supervisors in the continuing administration of the policy is essential. Supervisors are responsible for working cooperatively with personnel officials in developing realistic qualification standards for groups of positions as well as for individual vacancies; and for providing advice to personnel officials in establishing objective methods for identifying the best-qualified employees on a Department-wide basis.

* * * * *

SECTION 3. BASIC OPERATING PRINCIPLES

* * * * *

11. *Definitions.* The policy provides for consideration of all eligible employees of the Department and for their designation as qualified, well-qualified, or best-qualified. To be designated as:
    a. *Qualified*, a candidate must meet the minimum qualification requirements of the position, including any selective qualification factors.
    b. *Well-qualified*, a candidate's experience, training and potential must exceed the minimum qualification standards and any selective qualification factors specified.
    c. *Best-Qualified*, a candidate's experience, training, and potential must substantially exceed the minimum qualification standards for the position and any selective qualification factors to a degree that indicates he can meet the requirements of the job in a markedly superior manner.

* * * * *

13. *Consideration of Outside Candidates.* In developing the *List of Qualified Candidates*, personnel officials should insure that consideration is given to individuals outside the Department. By agreement

between the selecting official and the head of the primary personnel component or his designee, the names of qualified candidates from outside the Department, suggested by the selecting official, may be included on the lists of candidates eligible for consideration. If current experience or recruitment effort has demonstrated that better-qualified candidates are not available outside the Department, the head of the personnel component may elect to confine consideration to employees of the Department.

14. *Ad Hoc Rating Panels.* Candidates designated as well-qualified will be screened and rated by an ad hoc panel which will determine those who are best-qualified. * * * the panel will consist of the head of the primary personnel component or his representative and the selecting official. Should the ad hoc panel be unable to come to agreement on those candidates that are to be designated as best-qualified, the appropriate Director of Personnel will make the determination of the candidates to be included.

* * * * *

17. *List of Best-Qualified Candidates.* Ad hoc rating panels * * * will evaluate available candidates whose names are on the list of well-qualified eligibles, taking into consideration the candidates' experience, training, education, work performance, awards or special recognition for Federal service, and other pertinent information. In evaluating the candidates listed, the selecting official or personnel official may contact their past and current supervisors to gain further knowledge of their suitability for the vacancy, as evidenced by past performance, leave record, personal characteristics, on-the-job attitude, etc. If the panel members determine that one or more of the well-qualified candidates meet the criteria for *best*-qualified, they will assign that rating, and record their names on Part II of the *Selection List* (Best-Qualified Candidates), HUD Form No. 154.

18. *Final Selection of Candidates.* The selecting official will review the list of the best-qualified candidates developed by the ad hoc rating panel (of which he was a member) and make the final selection. If the list of best-qualified candidates includes the names of candidates from within and from outside the Department, the selecting official is required to make his choice from among the candidates who are employees of the Department.

* * * * *

19. *Release of Selected Candidate.* Upon receipt of the returned *Selection List* from the selecting official, the appropriate personnel official will arrange for release and entrance-on-duty dates for the employee selected. Normally, the selected employee will be required to be released from his current position two weeks after final selection. However, a maximum of thirty days generally may be permitted when a mutual agreement is reached between the releasing and receiving offices.

5. During the period here material, A HUD Handbook, 713.1, "Personnel Policy Equal Employment Opportunity", provided in pertinent substance that it was the policy and intent of HUD to provide equality of opportunity in employment for all qualified persons, and to prohibit discrimination because of race or color in all aspects of its personnel policies, programs, practices, and operations. The said Handbook required that Region II establish, maintain, and carry out an affirmative action plan designed to promote equal opportunity in every aspect of employment policy and practice, and set forth certain elements to be contained therein as a minimum. One such element was the adoption of measures necessary to insure genuine equality of opportunity for members of minority groups to participate fully on the basis of merit in all organizational units, occupations, and levels of responsibility. The said Handbook also stated that supervisors at all levels had vital responsibilities in the effective implementation of the HUD program of equal opportunity in employment, and that each supervisor was responsible for taking all actions affecting personnel and qualified applicants for employment based solely on merit principles. The said Handbook also provided for the filing of complaints of alleged discrimination, and for their processing. Paragraphs 21 and 22 of the said Handbook provided in part as follows:

21. *Hearing.*

a. *Offer of Hearing.* In any case which is not disposed of informally, the processing officer shall advise the complainant in writing of the tentative findings of the processing officer, of the complainant's right to a hearing, and of the importance on his part to indicate within 10 days, and preferably on a form to be provided, whether or not he desires a hearing. * * *

b. *Hearing Officer.* A hearing officer shall be selected by the processing officer with the approval of the Equal Employment Opportunity Officer and shall be an employee specially selected and trained to conduct hearings. The hearing officer shall not be a person who either investigated the complaint or took or reviewed an action or decision giving rise to the complaint.

c. *Prehearing Conference.* In arranging for the hearing, the hearing officer shall set up a prehearing conference at which he shall seek to clarify the issues, accept stipulations on facts to which both parties agree, establish schedule for the proceedings, and explain his role in the proceedings.

d. *Conduct of Hearing.* The hearing officer shall conduct the hearing so as to bring out pertinent facts, including the production of pertinent documents. Rules of evidence shall not be applied strictly, but the hearing officer shall exclude irrelevant or unduly repetitious evidence. Information having a bearing on the complaint or an employment policy or practice relevant to the complaint shall be received in evidence. The complainant, his representative, and the representatives of the Department at the hearing shall be given the opportunity to cross-examine witnesses who appear and testify. Testimony shall be under oath or affirmation.

e. *Witnesses.*

* * * * *

(2) * * * all witnesses shall be free from restraint, interference, coercion, discrimination, or reprisal in presenting testimony.

* * * * *

22. *Final Decision.*

a. The Equal Employment Opportunity Officer shall make the final decision on a complaint processed under this Chapter * * *. The decision shall be in writing and shall resolve the issue of discrimination raised by the complainant. Any required remedial action determined to be necessary or desirable to resolve the issue shall be incorporated in the notice of final decision. Copies of the decision shall be sent to the complainant and his representative * * *.

b. The written notice of decision shall advise the complainant of his right to appeal to the Civil

Service Commission if he is not satisfied with the resolution of the complaint. The notice shall also advise him of the time limit within which an appeal may be filed.

c. A decision by the Equal Employment Opportunity Officer may be reopened and reconsidered by the Secretary, who may affirm, modify, or reverse the decision, request further investigation, or grant a new hearing.

6. Throughout the period here relevant, there was in effect in Region II, HUD, an Affirmative Action Plan for equal opportunity, which required that it encourage minority candidates to compete for positions within HUD. Pursuant to the Plan, the Personnel Operations Division made recruiting contacts at predominantly black colleges to encourage seniors to apply for federal employment, and made affirmative efforts to inform the black community of federal employment opportunities. The purpose of the Plan was to assure that persons from minority groups received equal consideration for vacancies in Region II.

7. Late in 1967, or early in 1968, following a recommendation of a task force on which Vincent A. Marino, then Assistant Regional Administrator for Housing Assistance, Region II, HUD, served, the Social Services Office became a Branch, and a new position of Chief, Social Services Branch, grade GS–13, was authorized. In accordance with HUD (and Region II) policy, a job announcement of the vacancy was not posted on any bulletin board in Region II. At least for some time following the reorganization of the Social Services Office, Region II was under a hiring freeze. On October 7, 1968, however, Mr. Marino executed a Standard Form 52, Request for Personnel Action, reflecting a "VACANCY" for the new grade GS–13 position of Chief, Social Services, and requesting that Personnel "RECRUIT", with a proposed effective date as soon as possible. The said position was described as a "Standard Benchmark Position."

8. On July 25, 1968, Miss Thelma Doggett, who was then employed by the Redevelopment Authority of the City of Philadelphia as Relocation Manager, mailed to HUD an application for a position. Miss Doggett had graduated from Hampton Institute with a bachelor of science degree, and

had received a master's degree in social work from Columbia University in 1952. She had been continuously employed in social work since 1951, and in her position as Relocation Manager supervised 36 employees, including supervisors and field staff.

9. On August 8, 1968, William J. Bennett, Personnel Management Specialist for Region II, acknowledged Miss Doggett's application, but suggested that she resubmit it for a rating under the "Mid-Level Examination". Mr. Bennett also requested that Miss Doggett advise him of her "grade level" following her rating and notice of eligibility, and stated that he would then be able to give her specific information concerning any positions that might be available.

10. In consequence of Miss Doggett's submission of her application to the CSC, she was advised by the CSC August 20, 1968, that she had been assigned eligibility at grade GS–13 level. Miss Doggett so advised Mr. Bennett by letter. On August 27, 1968, Mr. Bennett acknowledged receipt of Miss Doggett's letter, and stated that "This will be attached to your application." Mr. Bennett also stated that "At the moment we are under a 'hiring freeze' and are unable to advise you of possible future vacancies", but that Miss Doggett would receive every consideration for any vacancy for which she qualified.

11. In September 1968, Myron Bradley, Director, Tenant and Operations Services Division, Housing Assistance Office, Region II, HUD (in which Division the Social Services Branch was organizationally located), and plaintiff's immediate supervisor, called Miss Doggett to request that she come to his office for an interview. Mr. Bradley interviewed Miss Doggett, at the Regional Office, on September 23, 1968. He expressed an interest in Miss Doggett's background and work experience, particularly as a supervisor, advised her that there was a vacancy in Region II in the position of Chief, Social Services Branch, grade GS–13, and said that he wanted her to meet Mr. Marino, but that Mr. Marino was in conference. While waiting to talk with Mr. Marino, Miss Doggett sat in briefly on an orientation meeting for new interns being conducted by Miss Stephanie Giddings in the Social Services Office. Miss Giddings testified administra-

tively, in 1970, that she "knew [Miss Doggett] had been selected when she was selected because * * *" Miss Doggett had sat in on the orientation meeting.[1] Miss Doggett was called out of the meeting, while it was still in progress, to meet with Mr. Marino. Mr. Marino told Miss Doggett of the existing vacancy in the Social Services Branch and of the duties of the position, asked her about her background and current employment, indicated to her the kind of person he was looking for, mentioning that he wanted someone with supervisory skills, and asked whether she would be interested in a job in Region II if one became available. Mr. Marino did not make any promises or commitments to Miss Doggett respecting employment then, or at any other time prior to January 14, 1969. He was, however, quite impressed with Miss Doggett's background and experience, and with her personal characteristics (poise, articulateness, and concern for people) during the interview. At the conclusion of the interview, Miss Doggett was told that if anything came up she would hear from Personnel. She understood, however, that she would hear from Personnel one way or the other. She had no further contact with Region II during 1968.

12. On October 7, 1968, in response to the S.F. 52 described in finding 7, *supra*, Mr. Bennett prepared a list of "qualified" candidates for the position of Chief, Social Services Branch, grade GS–13. The list contained the names of four employees of HUD (including plaintiff) and the name of one candidate from outside HUD (Miss Doggett). The "qualified" list indicated that Miss Doggett was an "outside candidate". Bennett also then prepared a list of "well-qualified" candidates for the said position. The "well-qualified" list contained three of the names on the "qualified" list: those of plaintiff, Miss Doggett, and Raymond Zimmerman, a white.

13. Prior to October 16, 1968, Mr. Zimmerman, already a grade GS–13, had advised Mr. Bennett, in response to Mr. Bennett's inquiry, that he was not interested in the position of Chief, Social Services Branch. He testified at trial that he had so advised Mr. Bennett because he did not want to be in

[1] The weight of the evidence is that this conclusion was an unjustified one.

a position of competing with plaintiff for the position, and if selected to be her supervisor.

14. The "qualified" and "well-qualified" lists Mr. Bennett had prepared were turned over to James A. Quinn, Region II Director of Personnel, and taken by him to Mr. Marino. Upon receiving the lists, Mr. Marino indicated that he desired Mr. Zimmerman for the position. Mr. Quinn told Mr. Marino that Mr. Zimmerman had indicated a lack of interest in the position. Mr. Marino nonetheless talked with Mr. Zimmerman, who reiterated that he did not desire the job.

15. At trial of this cause, Mr. Zimmerman testified that during "this same time frame", and perhaps in late September or early October 1968, at a meeting at the Central Relocation Bureau (apparently part of the Philadelphia Redevelopment Authority) "someone" said "they heard that HUD was going to get another one of their employees." Mr. Zimmerman also testified that when he asked whom, "they said Thelma Doggett." Late in 1968, in the course of a conversation with Mr. Bennett initiated as a result of a call from plaintiff to Mr. Zimmerman, Mr. Zimmerman got the impression that Miss Doggett was "the person for the job", and Mr. Zimmerman thereupon called plaintiff and told her that Miss Doggett "had the job."

16. Plaintiff first learned that the position of Chief, Social Services Branch, grade GS–13, would be filled some time between October 7, 1968, and the end of that month. At the time she was, and for some time had been, serving as the head of the Social Services Office (or Branch). She then had some 20 years' federal service and extensive experience in the social services field, and was concededly "well-qualified" for that position.

17. Sometime prior to December 20, 1968, while serving in the Social Services Office (or Branch) in grade GS–12, plaintiff had received a within-grade increase. On December 19, 1968, Mr. Bradley, plaintiff's immediate supervisor, showed her the list of "well-qualified" candidates for the position of Chief, Social Services Branch, grade GS–13. When she questioned Mr. Bradley about Miss Doggett, whose name was also on that list, Mr. Bradley indicated that Miss Doggett was employed by the Philadelphia Relocation Office.

In response to plaintiff's inquiries as to Miss Doggett's qualifications, Mr. Bradley, in plaintiff's view, spent some time "justifying" Miss Doggett's qualifications. Plaintiff's call to Mr. Zimmerman, described in finding 15, *supra*, followed this conversation. Shortly thereafter, plaintiff met with Mr. Marino and Mr. Bradley, indicated that she felt the vacancy was not being filled according to regulations, insisted that applicable regulations be followed, and requested that the position not be filled until after her return from Christmas leave. Mr. Marino advised plaintiff that the job would not be filled until after her return from leave, and that the proper procedures would be followed in filling it.

18. At some time following October 7, 1968, and most probably around January 14, 1969, Mr. Quinn placed on the "well-qualified" list, opposite the three names it contained, the remarks set forth below:

Name	*Remarks*
Madeline Hodge	Qualifications Exceed Minimum GS–101–13 Requirements in X–118
Raymond Zimmerman	Not Interested—Declined Consideration
Thelma Doggett	Qualifications Exceed Minimum GS–101–13 Requirements in X–118

19. The Ad Hoc Rating Panel ("the Panel") to screen and rate "well-qualified" candidates for the position of Chief, Social Services Branch (see finding 4, *supra*) consisted of Mr. Marino and Mr. Quinn. The establishment of the Panel was not formally documented, and it kept no minutes of its deliberations. At a preliminary Panel meeting (probably in December 1968, although precisely when is unclear) Mr. Marino and Mr. Quinn agreed that Mr. Marino would obtain from plaintiff's supervisors their evaluations of plaintiff, and that Mr. Quinn would obtain from Miss Doggett's supervisors their evaluations of her.

20. On January 6, 1969, Mr. Quinn obtained in person from one of Miss Doggett's supervisors, and by a telephone call to another of her supervisors, evaluations of Miss Doggett. He then had his notes of the conversations typed in the form of a memorandum to Mr. Marino.

21. On January 10, 1969, plaintiff, and her representative, met with Warren Phelan, Regional Administrator, to discuss the filling of the position of Chief, Social Services Branch. Plaintiff conveyed to Mr. Phelan her belief that appropriate procedures were being violated in the filling of that position.

22. On January 13, 1969, Mr. Marino called plaintiff to his office for a formal interview in connection with the vacancy for the position of Chief, Social Services Branch. Mr. Marino discussed with plaintiff her qualifications for the position, and indicated to her the primary personal characteristics he thought essential for the person to be selected for that job. Plaintiff repeated what she had said to Mr. Phelan on January 10, 1969, said that she intended to speak with her Senator about the position, and told Mr. Marino that if the job were not filled according to regulations she would file a complaint.

23. On January 14, 1969, Mr. Quinn and Mr. Marino met, in the latter's office, as the Panel, for the purpose of selecting the best-qualified candidate (or candidates) for the position of Chief, Social Services Branch. Mr. Quinn brought with him to the meeting plaintiff's official personnel folder, Miss Doggett's Standard Form 171 (application for federal employment), his memorandum to Mr. Marino concerning Miss Doggett (prepared by Mr. Quinn after talking with two of Miss Doggett's supervisors), the qualified and well-qualified lists, and a blank best-qualified list.

24. At the said meeting, Mr. Quinn was told by Mr. Marino that the latter had not yet obtained evaluations of plaintiff from her supervisors. In Mr. Quinn's presence, Mr. Marino (who had himself directly supervised plaintiff at Region II from February 1967 to some time in 1968) then obtained from one of plaintiff's former direct supervisors his evaluation of plaintiff's potential for a supervisory position. During Mr. Marino's temporary absence from his office, Mr. Quinn also spoke by telephone with plaintiff's direct supervisor to obtain his evaluation of plaintiff's supervisory potential at that time. Mr. Quinn subsequently informed Mr. Marino of the results of that call. Mr. Marino then gave Mr. Quinn his own evaluation of plaintiff. Mr. Marino had also obtained

from another of plaintiff's supervisors an unfavorable opinion about plaintiff sometime prior to September 1968. While it is not clear that that opinion was alluded to January 14, 1969, the weight of the evidence is that (including Mr. Marino's evaluation) at least three negative recommendations concerning plaintiff's possible selection for the position of Chief, Social Services Branch, grade GS–13, were presented to the Panel January 14, 1969.

25. After discussing the evaluations of plaintiff and Miss Doggett before the Panel, going through plaintiff's personnel folder, and reviewing the experience, education, work performance, awards, and supervisory skill or potential of the two "well-qualified" candidates, the Panel members agreed that plaintiff's name should not be placed on the "best-qualified" list, and that Miss Doggett's name should be placed on that list. The decisions of the Panel were unanimous. Had there been any disagreement as to placement of candidates to be designated as "best-qualified", Mr. Quinn would have had the power to make the determination of the candidates to be included on that list.

26. At the conclusion of the January 14, 1969 Panel meeting, Miss Doggett's name was placed on the "best-qualified" list. Plaintiff's name was not placed thereon. Both Mr. Marino and Mr. Quinn signed the said list, indicating their agreement thereto. Mr. Marino, as selecting official, then selected Miss Doggett for the position of Chief, Social Services Office, grade GS–13. Mr. Quinn then advised Mr. Marino that since Miss Doggett had to be in reach on a CSC Certificate of Eligibles the selection could only be conditional, and endorsed the list "pending being within reach on appropriate CSC eligible list."

27. Under HUD regulations in effect in January 1969, had plaintiff been placed on the "best-qualified" list (along with Miss Doggett), Mr. Marino, as selecting official, would have been required to select plaintiff, as an employee of the Department, rather than Miss Doggett, who was then "outside" the Department.

28. On January 14, 1969, Mr. Marino was obviously not unaware of his previous relationship with plaintiff. In his view, she was lacking in essential supervisory characteristics.

The record does not establish, however, that the unanimous decisions of the Panel on January 14, 1969, were the result of any "pre-selection" of Miss Doggett, that plaintiff was in any way denied fair and proper consideration in the selection process, or that any violation of her procedural or regulatory rights occurred therein. Mr. Quinn, who had not met Miss Doggett prior to January 14, 1969, may well have been unaware of her race on that day. In any event, neither Mr. Quinn's nor Mr. Marino's judgments have been shown to have been affected by racial considerations, and those of the Panel have not been shown to have been affected by any improper ones.

29. On January 14, 1969, plaintiff spoke with someone on the staff of Senator Scott, in Washington, D.C., to request information on the filling of the position of Chief, Social Services Branch. During the conversation, she reiterated her belief that the position was not being properly filled. A few days later a member of Senator Scott's office called plaintiff to say that the position had been filled, and that she had not been selected for it. Plaintiff was not informed of the results of the selection process by anyone in Region II until March 12, 1969, when Mr. Marino told her that Miss Doggett had been selected to fill the position.

30. On January 27, 1969, the Personnel Office, Region II, submitted to the CSC Standard Form 39, Request for Certification, for the position of Chief, Social Services Branch, grade GS–13. The said form, in essence a request for a list of persons eligible for a career or career-conditional appointment from the Central Register of the appropriate Civil Service list of eligibles, also contained the request "that Miss Thelma Doggett * * * be certified for the above vacancy."

31. On February 13, 1969, the CSC issued a Certificate of Eligibles containing six names, with ratings, the first four of which were as follows:

Rating	
104.0 TP	Denis A. Dryden
99.0 TP	Carl L. Barnes
98.0 TP	Raymond L. Bady
97.0	Thelma Doggett

Miss Doggett's name, and the two names below hers on the Certificate, were marked with an asterisk, to indicate "To provide for declinations." Messrs. Dryden, Barnes, and Bady all had tentative preference. Under then applicable CSC regulations, Region II was required to make its selection from among the top three interested available persons on the Certificate of Eligibles. Moreover, in making such a selection, Region II could not pass over a veterans preference eligible to select a non-veteran.

32. Following February 13, 1969, Mr. Quinn prepared a Standard Form 13, Telegraphic Message, setting forth the contents of a telegram to be transmitted to Messrs. Dryden, Barnes, and Bady, as follows:

> Your name was one of several certified from Civil Service Commission senior level eligible register for consideration for a Chief, Social Services Branch, GS–13 position $14,409 PA in HUD Region II Housing Assistance Office, Philadelphia, Pa. Notify Mr. Quinn Rm. 642, Widener Bldg. 1339 Chestnut St., Phila., Pa. 19107 within five days whether you desire to be further considered for this opening.

By letter of February 26, 1969, Mr. Dryden acknowledged receipt of Region II's telegram, but indicated that he did not plan to leave the position he then held. Mr. Bady, during a telephone conversation of February 24, 1969, with Mr. Bennett, declined further consideration because he did not wish to relocate.

33. The Standard Form 13, Telegraphic Message, prepared by Mr. Quinn (finding 32, *supra*) correctly set forth Mr. Barnes' home address. The files of the Region II Personnel Office contain an unsigned, and unidentified, Stardard Form 63, Memorandum of Call, dated February 24, 1969, addressed to Mr. Quinn and reflecting that at 10:25 a.m. that day he had been called by "Carl Barnes, Re: Telegram for Social Services br. position —— He does *not* wish to be considered." (Emphasis not supplied.) The said memorandum correctly noted Mr. Barnes' home telephone number. If the telegraphic message was sent to Mr. Barnes, he did not receive it. Nor did Mr. Barnes call Mr. Quinn (or anyone else) to indicate that he did not wish to be considered for the position of Chief, Social Services Branch. Mr. Barnes

was unable at trial to explain either his failure to receive the telegraphic message or the memorandum of call described above, and none of the other witnesses cast any real light on the situation. Had Mr. Barnes been advised, in early 1969, that he was being considered for the position of Chief, Social Services Branch, he would have been quite interested in it.

34. On or after February 26, 1969, the CSC Certificate of Eligibles was returned by the Personnel Office, Region II, to the CSC with notations thereon that Messrs. Dryden, Barnes, and Bady had declined the position of Chief, Social Services Branch, grade GS–13, and that Miss Doggett had accepted the said position. The Region II Personnel Office also returned with the Certificate Mr. Dryden's written declination, the memorandum of Mr. Bady's declination, and the memorandum of call purporting to reflect Mr. Barnes' declination.

35. (a) In January 1969, Miss Doggett, who had heard nothing from Region II about her application following her interview with Mr. Bradley (and her meeting with Mr. Marino) in September 1968 (finding 11, *supra*) called Mr. Quinn to inquire about the status of her application. Mr. Quinn then advised her that he was unable to give her any real information about its status.

(b) In February 1969, because she was under consideration for another position, outside HUD, and had to make a decision, Miss Doggett again spoke with Mr. Quinn about her application. Mr. Quinn then advised her that she was under consideration for the position of Chief, Social Services Branch, that there were three veterans ahead of her on the Certificate of Eligibles, and that a final selection had not yet been made.

(c) In the early part of March 1969, Mr. Quinn called Miss Doggett, at her home, to offer her the position of Chief, Social Services Branch. Miss Doggett then advised Mr. Quinn that she had been offered another job, and wanted some time to think the matter over. Within about a week, Miss Doggett called Mr. Quinn to say that she would accept the position. Because computerization of Region II personnel records was then in process, Mr. Quinn suggested March 23, 1969, as the date of her entry on duty.

(d) By letter dated March 17, 1969, to Miss Doggett, Mr. Quinn confirmed her selection for the position of Chief, Social Services Branch, GS–13, with a scheduled reporting for duty date of March 24, 1969. Miss Doggett reported for work at Region II on that date.

36. By letter dated April 24, 1969, plaintiff filed with the Assistant Secretary for Equal Opportunity, HUD, a formal discrimination complaint under the Department's Equal Employment Opportunity Program. In essence, plaintiff asserted that in the filling of the position of Chief, Social Services Branch, grade GS–13, Miss Doggett, a black, had been given preferential treatment, and that plaintiff, a white, had not been "given equal opportunity or consideration * * *."

37. By letter dated April 26, 1969, plaintiff filed with the Regional Administrator, Region II, HUD, a grievance complaint. In essence, plaintiff asserted a violation of HUD personnel policy Merit Staffing regulations in the filling of the position of Chief, Social Services Branch, grade GS–13, and requested that prompt action be taken to cancel the selection of Miss Doggett and "to filling it in compliance with your own regulations."

38. On May 5, 1969, the Assistant Secretary for Equal Opportunity, HUD, referred plaintiff's formal discrimination complaint to the Director, Inspection Division, HUD, for investigation under Part I, Executive Order 11246, and applicable HUD and CSC regulations.

39. At plaintiff's request, her formal discrimination complaint and her grievance were combined and processed under HUD's Equal Employment Opportunity policy and procedures. Following an investigation by Hugh L. Gauntt, Mr. Gauntt prepared a report of investigation, dated October 1, 1969, with some 17 exhibits. A copy of the report of investigation was furnished to plaintiff on October 15, 1969.

40. To September 8, 1969, plaintiff was represented in certain matters related to her employment in Region II by Thomas J. Wing, an officer of Lodge No. 2032, American Federation of Government Employees ("AFGE"), and an employee of Region II. On September 8, 1969, Mr. Wing was promoted to the position of Chief, Operation Engineering Services, Region II. Mr. Wing understood that, after

his promotion to a supervisory position, he could not hold an office in a federal employees' union. He withdrew as plaintiff's representative upon his promotion because he was no longer an officer of AFGE Lodge No. 2032.

41. On November 14, 1969, plaintiff waived informal disposition and informal adjustment of her April 24, 1969 formal discrimination complaint, and requested a formal hearing under HUD grievance procedures. On March 20, 1970, Theolius H. Alexander was selected as Hearing Officer. A prehearing conference was scheduled (and held) on April 22, 1970.

42. At the April 22, 1970 prehearing conference, it was determined that plaintiff's discrimination complaint would be considered together with her grievance, and that the alleged violation of Merit Staffing would be combined with the hearing for processing under the Equal Employment Opportunity procedures.

43. Plaintiff's formal hearing commenced May 12, 1970, and adjourned June 18, 1970. The transcript of testimony, consisting of some 1600 pages, has been received in evidence as a joint exhibit.

44. At the outset of the hearing, plaintiff objected to the Hearing Officer's ruling that the burden of going forward rested with plaintiff, and that her case was to be presented first.

45. The record of testimony reflects an objection by plaintiff that Mr. Quinn, Agency Representative at the said hearing, had had an opportunity, in advance of the hearing, to discuss plaintiff's "case" with several witnesses called by plaintiff to testify at the hearing. Prior to doing so, agency representatives had informally talked with the Hearing Officer to ascertain whether there were any prohibitions against communicating with adverse witnesses, and had been advised that the Hearing Officer was unaware of any restrictions upon the agency talking with witnesses for the purpose of preparing its case. No improper agency conduct in interviewing the witnesses has been noted by plaintiff; the objection is to the interviews *per se*.

46. Mr. Quinn, Agency Representative at the said hearing, testified, over plaintiff's objection, on June 18, 1970. In over-

ruling plaintiff's objection, the Hearing Officer held that Mr. Quinn might testify "as to the technical aspect of personnel procedure, policy, regulations, including the requirements pertaining to the Merit Staffing and promotion, insofar as such matters relate to the case being heard", and "as to his role and performance as a member of the Ad Hoc rating panel." The Hearing Officer noted both his responsibility to gather relevant and factual information and to make a report in the matter. The Hearing Officer also noted that plaintiff had earlier been apprised of Agency intent to call Mr. Quinn, and had not objected thereto.

47. By letter dated September 30, 1970, the Hearing Officer transmitted to the Assistant Secretary for Equal Employment, HUD, his report of findings with respect to plaintiff's "Complaint." In the said report, some 14 pages long, the Hearing Officer found, *inter alia*, that there was "no conclusive evidence * * * in either the report of investigation or the hearing record that would substantiate the complainant's allegation of racial discrimination." The Hearing Officer also found, in substance, that plaintiff's contentions in support of her claim of violation of Merit Staffing procedures were without merit. Specifically, (1) plaintiff's contention of "pre-selection" of Miss Doggett, and "pre-rejection" of plaintiff, was rejected on the absence of "any evidence that would definitively support the contention of pre-selection of Miss Thelma Doggett or pre-rejection of * * *" plaintiff; (2) plaintiff's contention of undue delay in effectuating the selection contrary to CSC guidelines and Merit Staffing provisions was rejected on the ground that "an analysis of the events that took place renders the so-called delay understandable", and that, according to advice sought by the Hearing Examiner from the Philadelphia Region, CSC (in consequence of testimony by plaintiff that, according to the Commission, candidates could not be selected for a position unless they were in reach at the time of such selection), the procedure employed by Region II in selecting Miss Doggett for the position of Chief, Social Services Branch, was proper and did not constitute a violation of CSC regulations; (3) plaintiff's contention that the Ad Hoc Rating Panel's decision was not made on a factual, sufficient, or supportable

basis was rejected on the ground, in substance, that the Panel's conclusion that plaintiff's "supervisory skill and potential were deficient to the extent that in its judgment Miss Hodge could not perform the job in a markedly superior manner" were not unsupported by substantial evidence; (4) plaintiff's charge of improper retention and use of certain records in her personnel folder was rejected as not "adequately presented or substantiated * * *"; (5) plaintiff's charge of "evidence of bad faith", in that Miss Elizabeth Wood had suggested to plaintiff she resign, was rejected on the ground that the suggestion, made after March 24, 1969, had not been shown to have any "relationship to the basic charges * * * of racial discrimination and violation of the merit staffing procedures"; and (6) plaintiff's charge of bad faith, in that a promise to remove certain material from her personnel file had not been fulfilled, was rejected as contrary to the evidence. The Hearing Officer stated, in connection with plaintiff's second contention, that had any of the three persons on the Certificate of Eligibles rated higher than Miss Doggett "indicated an interest in the position the tentative selection of Miss Doggett would have had to be reversed or cancelled."

48. By letter dated December 10, 1970, the Assistant Secretary for Equal Opportunity, HUD, advised plaintiff in part of his "decision, based on facts developed during the investigation and the hearing, that there is no evidence to support the claim that you were discriminated against in your employment on the basis of race." Plaintiff was advised of her right to appeal to the CSC if not satisfied with that decision.

49. On December 21, 1970, plaintiff, through her representative, a national officer of AFGE, timely appealed the Assistant Secretary's decision to the Board of Appeals and Review ("BAR"), CSC.

50. By decision dated June 10, 1971, the BAR, CSC, affirmed the Assistant Secretary's decision. Among other things, the BAR found "insufficient evidence to support the allegation that Miss Doggett was pre-selected for the position or that special efforts were made to fill the position with a black person", and that "the reasons offered by Mr. Marino

for not including [plaintiff] in the 'best qualified' group for further consideration for the position in question are reasonable and that no evidence has been produced to support the allegation that race was a factor of consideration." The Board also found no violation of merit promotion procedures with respect to asserted delay in filling the position of Chief, Social Services Branch. The Board noted that plaintiff's supervisors agreed generally that she had the technical knowledge and competence to perform adequately, but had indicated that they could not recommend her for the position of Chief, Social Services Branch, because of her inter-personal relationships.

51. That Mr. Barnes received no telegram from HUD Region II concerning the position of Chief, Social Services Branch, and that he did not call Mr. Quinn (or anyone else) to indicate lack of interest in that position (finding 33, *supra*) do not appear in the administrative record.

ULTIMATE FINDINGS AND CONCLUSIONS

52. In broad terms, plaintiff contends (a) that she was unlawfully discriminated against by officials or employees of defendant; (b) that the failure of the Ad Hoc Rating Panel to place her on the "best-qualified" list was unlawful and contrary to regulations; (c) that, had she been placed on that list, her selection (at least in preference to Miss Doggett) would have been mandatory; (d) that after Miss Doggett's "pre-selection", Region II went through a "sham program", pretending to contact eligibles rated higher than Miss Doggett, and recording, erroneously, that each of the eligibles had declined the position; and (e) that an "ex parte" procedure during the "administrative review" of plaintiff's appeal from Region II's actions was "highly improper and denied to plaintiff all of her procedural guarantees." Plaintiff further asserts certain "procedural errors in the record", each of which will be considered hereinafter (albeit, since many of the asserted errors rest on assumptions of discrimination, "pre-selection", or plaintiff's right to placement on the "best-qualified" list, not each separate assertion will be specifically treated herein.)

53. HUD regulations prohibit racial discrimination in personnel actions. However, plaintiff's contention of discrimina-

tion by reason of race in the process of selection for the position of Chief, Social Services Branch, and of Miss Doggett's "pre-selection" for that position, cannot be accepted, on this record. There is no credible proof that any officer or employee of defendant involved in the filling of that position discriminated against plaintiff (or in favor of Miss Doggett) on racial (or any other forbidden) grounds, pre-selected Miss Doggett because she was black, or pre-rejected plaintiff because she was not. In this connection, it is not insignificant that as late as October 1968, some months after plaintiff says the pre-selection of Miss Doggett had already occurred, Region II's first choice for that position was Mr. Zimmerman, a white.

54. In broad terms, the record fails to establish that any officer or employee of defendant involved in the filling of the position of Chief, Social Services Branch, acted arbitrarily, capriciously, or contrary to law or regulation in the administrative process culminating in the selection of Miss Doggett for that position. No material breach of paragraph 5, HUD Handbook 335.1 (finding 4, *supra*) pertaining to informing employees regarding Merit Staffing, and following regulations, has been proven, and neither paragraph 17, HUD Handbook 335.1, nor the revelant paragraph of the Federal Personnel Manual, pertaining to referral of candidates to the selecting official, was violated by the placement of a single name on the "best-qualified" list. Considering outside candidates was plainly not unlawful. While plaintiff was undeniably "well-qualified" for the position of Chief, Social Services Branch, as the Ad Hoc Rating Panel found, the concomitant Panel determination that plaintiff was not entitled to placement on the "best-qualified" list has not been shown to be erroneous as a matter of law, violative of any of plaintiff's regulatory rights, arbitrary, capricious, or unsupported by substantial evidence. Thus, the provisions of paragraph 18, HUD Handbook 335.1 (finding 4, *supra*), giving a Department employee preferential treatment vis-a-vis an outsider, are wholly irrelevant, insofar as plaintiff is concerned. All else aside, so too are the provisions of the Federal Personnel Manual pertaining to rectification of violations of law, CSC regulations and instructions, and agency

policies, guidelines, and promotion plans. Finally, no irregularities respecting interviews have been established.

55. Plaintiff asserts that the Federal Personnel Manual provides that agencies should avoid practices that may lead employees to believe that a person was pre-selected for a job, or that a promotion was based on favoritism. She further contends that Miss Doggett's pre-selection violated that sound precept, and that of the Affirmative Action Plan as well. As found hereinabove, however, no such pre-selection has been proven. Thus, there is no actionable violation of regulations in this respect. The requirement that supervisors conduct personnel relationships so as to "foster effective teamwork and high morale" furnishes no basis for comfort to plaintiff. While plaintiff's dissatisfaction with her failure of selection for the position of Chief, Social Services Branch, is not only clear, but understandable, defendant is under no duty to compensate plaintiff by way of money damages because of that dissatisfaction.

56. Mr. Barnes' failure to receive the telegram Mr. Quinn prepared for him, and the matter of Mr. Barnes' purported telephone call to Mr. Quinn, are both puzzling and, on this record, unexplained, but this is of no help to plaintiff. Insofar as the record shows, Mr. Barnes has taken no action to assert any rights he might have to the position of Chief, Social Services Branch, and he is not a party to this action. The administrative decision not to move plaintiff to the "best-qualified" list of candidates for that position was a permissible one, and even assuming irregularities might have prevented Mr. Barnes' employment as Chief, Social Services Branch, Region II, HUD, there is no proper basis for concluding that this would confer on plaintiff any right to recover the salary of that position in this action, since, in any event, plaintiff suffered no harm thereby.

57. Particularly in view of the nature of the administrative hearing, plaintiff has failed to show that the Hearing Officer's ruling that the burden of going forward rested with plaintiff represented an abuse of discretion, was arbitrary or capricious, or was prejudicial to her. That government officials "were permitted to interrogate, question and generally cross-examine and pre-indoctrinate plaintiff's own witnesses,

without the knowledge and consent of the Hearing Officer (or of plaintiff)" is not an accurate depiction of the record. While agency representatives did interview witnesses ultimately called administratively by plaintiff, the record fails to reflect any improper agency conduct. The mere interviewing of witnesses in a case by one party thereto clearly does not amount to a denial of a full and fair hearing, nor is it unlawful administrative action denying procedural rights.

58. Plaintiff also contends that an "ex parte excursion" by the Hearing Officer (see finding 47, *supra*) violates the principles of paragraph 21(d), HUD Handbook 713.1 (finding 5, *supra*). The record reflects that, following plaintiff's testimony concerning information she had received from the CSC that a candidate could not be selected unless within reach at the time of selection, the Hearing Officer stated that if he felt that the testimony had not brought out all of the pertinent facts, he wanted to feel free to contact plaintiff's source himself. Subsequently, the Hearing Officer did speak with the Philadelphia Regional Office of the CSC, in his words "described the procedure used in this case, as testified to by Mr. Quinn", asked whether there had been any violation of CSC regulations, and was told that "the procedure used by the Department was proper and did not constitute a violation of the Commission's regulations." It is clear from the record, however, that the "ex parte" communication was in no way prejudicial to plaintiff. Indeed, aside from the fact of the communication itself, plaintiff suggests no harm to her. Thus, without condoning the Hearing Officer's action, it plainly does not amount to a vitiating defect. See *Grover* v. *United States*, 200 Ct. Cl. 337, 350 (1973); *Haynes* v. *United States*, 190 Ct. Cl. 9, 14–15, 418 F. 2d 1380, 1383–84 (1969). The situation in this case is wholly unlike those before the court in *Jarett* v. *United States*, 195 Ct. Cl. 320, 451 F. 2d 623 (1971) and *Camero* v. *United States*, 179 Ct. Cl. 520, 375 F. 2d 777 (1967). In this case, there was plainly no impairment of either the impartiality of the Hearing Officer or the fundamental fairness of the administrative proceeding. *Grover* v. *United States*, *supra*. In this connection, it is worthy of passing mention that the Assistant Secretary for Equal Employment Opportunity, not the Hearing

Officer, made the final decision on plaintiff's discrimination complaint, and that the CSC found no basis for overturning that decision on appeal. In any event, in the circumstances of this case to hold that what is at worst harmless error should serve as a basis for awarding plaintiff a money judgment for the salary of a position for which she was validly not selected, and in which she has never served, would be an undue and unjustifiable elevation of pure form over substance.

59. Upon a careful consideration of the entire record in this case, plaintiff has failed to establish that in either the process of selection for the position of Chief, Social Services Branch, grade GS–13, Region II, HUD, or in the administrative reviews of plaintiff's complaints concerning that selection process, defendant's actions were arbitrary, capricious, unlawful, or unsupported by substantial evidence.

CONCLUSION OF LAW

Upon the foregoing findings of fact, ultimate findings and conclusions, and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.

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530 F. 2d 1384

ARK-MO FARMS, INC. v. THE UNITED STATES

[No. 325–72. Decided February 18, 1976]

ON THE PROOFS

Eminent domain; taking; intermittent flooding; evidence; hearsay exception.—Plaintiff seeks just compensation for the taking by the United States of a part of the value of its farm by flooding allegedly the consequence of the closing of Dam No. 2 12 miles below the farm on the Arkansas River. The dam was part of a multi-purpose project authorized by the River and Harbor Act of 1938. It is *held* that plaintiff has not sustained its burden of proving that by the closing of the dam the floods increased in elevation, duration or frequency. It is also *held* that the study prepared by Government engineers and technicians in regular course admitted during the testimony of the Government's expert witness, which was not rebutted by plaintiff

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and which received but minimal cross-examination from plaintiff, is material, is more probative than other evidence, and the objectives of rules of evidence and the interests of justice will be best served by admission thereof into evidence under the shopbook hearsay exception. Plaintiff is not entitled to recover and the petition is dismissed.

Eminent domain; taking; compensability; intermittent flooding.

[1] Where the intermittent floods which took place on plaintiff's farm following completion of the multi-purpose project on the Arkansas River authorized by the River and Harbor Act of 1938 have not been proven to have increased in elevation, duration or frequency by the project or its dam located below plaintiff's property, plaintiff has not sustained its burden of proof as to causation entitling it to just compensation therefor.

Eminent domain ⟸ 300

Evidence; hearsay rule; hearsay exception; regularly kept records.

[2] A hydrological study prepared by Government engineers in regular course during the subject multi-purpose project on the Arkansas River and testimony by a highly qualified witness who interpreted and explained the data and calculations are admissible in evidence although some of the individuals who prepared the study were not present in court, since the engineering techniques employed are sufficient guarantee of reliability to warrant admission under a liberal interpretation of the shopbook hearsay exception. It would stultify legal proceedings and deny good sense to condition the receipt of this evidence on the presence in court of the numerous technicians and engineers who participated in the preparation of the study.

Evidence ⟸ 341

Evidence; hearsay rule; hearsay exception; Federal Rules of Evidence; discretion of court.

[3] To extent that evidence may not be admitted under the shopbook hearsay exception, it may be admitted pursuant to the residual discretion of a trial court in a non-jury case to admit into evidence hearsay found to be the best evidence reasonably available and to have assurance of accuracy and reliability, and findings may be made upon which the Federal Rules of Evidence condition admissibility.

Evidence ⟸ 314(1)

James T. Gooch, attorney of record for plaintiff. *J. Hugh Lookadoo, Jr.*, and *Lookadoo, Gooch & Lookadoo, of counsel.*

John E. Lindskold, with whom was *Assistant Attorney General Peter R. Taft*, for defendant.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, and KUNZIG, *Judge*.

PER CURIAM: This case comes before the court on plaintiff's exceptions to the recommended decision of Trial Judge David Schwartz, filed March 31, 1975, pursuant to Rule 134(h), having been submitted to the court on oral argument and the briefs of counsel. Upon consideration thereof, since the court agrees with the trial judge's recommended decision, as hereinafter set forth*, it hereby affirms and adopts the decision as the basis for its judgment in this case. Therefore, it is concluded that plaintiff is not entitled to recover and the petition is dismissed.

OPINION OF TRIAL JUDGE

SCHWARTZ, *Trial Judge:* Plaintiff, the owner from 1965 to 1974 of a 10,000 acre farm on the Arkansas River in Jefferson County, Arkansas, sues for the taking by the United States of a part of the value of the farm by flooding allegedly the consequence of the April 1, 1968 closing of Dam No. 2 of the McClellan-Kerr Arkansas River Navigation System, some 12 miles below the farm. The action fails, for reasons set out in detail in the findings and here summarized briefly.

The System, authorized by the River & Harbor Act of 1938, 52 Stat. 1215, 1218, is a multi-purpose project on the Arkansas River, whose primary purpose is the creation of a navigation channel from above Tulsa, Oklahoma through the Arkansas River past the plaintiff's farm to the White River and on to the Mississippi. The project includes a number of flood control structures, all upstream from plaintiff's farm. Dam No. 2, located 12 miles below the farm, maintains a navigation pool to a constant elevation.

Plaintiff bought the farm in 1965, cleared the woodland on it and in 1967 planted and harvested a good crop of soybeans. Beginning in 1968, the farm suffered floods of varying sever-

*Whereas the court adopts the trial judge's separate findings of fact, which are set forth in his opinion filed March 31, 1975, they are not printed herein since such facts as are necessary to the decision are contained in his opinion.

ity in each year through 1973, the last year as to which evidence was given at the trial. The floods caused substantial damage to crops. The foregoing was plaintiff's entire proof.

No proof was made that Dam No. 2 or any other consequence of the project was the cause of the floods complained of. This failure of proof would alone dispose of plaintiff's case.

Evidence presented by defendant demonstrated that 1965, the year in which plaintiff bought the farm, was the midpoint of a severe drought extending from 1963 to 1967, and that the floods in 1968 and thereafter were no more frequent or severe than the floods in the pre-drought years before 1963. It appeared, too, that the soil on plaintiff's farm was composed of an impermeable clay which would retain rainfall, and create flood conditions at times when there was no hydrological data of floods in the water-courses bordering the farm.

In addition, detailed and unchallenged hydrological data was put in evidence by the defendant showing that the project had in fact decreased peaks, duration and frequency of floods at the farm. The dams and reservoirs upstream from the farm have, it appears, retained peak floodwater, allowing it to flow downstream over longer periods than otherwise. The consequence has been an increase in the duration of water elevations at lower levels and a decrease in peaks, duration and frequency of high level floods. It is a case of at most "little injury in comparison with far greater benefits conferred." *United States* v. *Sponenbarger*, 308 U.S. 256, 267 (1939).

The hydrological evidence took the form of a study prepared by the Government's expert witness, a hydraulic engineer and chief of the Hydrological Engineering Division, Hydraulics Branch, of the Little Rock District of the Corps of Engineers. The farm is located in the Little Rock District. The basic data for the study had been gathered, in regular course, throughout the project. The calculations relating to the area of the farm had been performed by the witness; other parts of the calculations had been performed by comparable professionals in a neighboring district of the Little

Rock District. The study and the expert's conclusions on the basis of the data were furnished to plaintiff in pretrial proceedings, in sufficient time for plaintiff to prepare to respond to it. At trial, the expert, on the stand, interpreted and explained the data and the calculations and their significance for the case at hand. The testimony went unchallenged. Plaintiff did not cross-examine on any material matter, and did not present any hydrological evidence.

The study and the amplifying testimony were admitted in evidence over the objection that the data was gathered and the calculations made, at least in part, by members of the Corps of Engineers not present in court. It would stultify legal proceedings and deny good sense to condition the receipt of this evidence on the presence in court of the numerous technicians and engineers who necessarily participate in the creation of a hydrological study of the effects of a vast river basin flood control project on a particular area. The engineering techniques employed, testified to by the highly qualified witness who did appear, are sufficient guarantee of reliability to warrant admission under a liberal interpretation of the classic shop-book hearsay exception. *Massachusetts Bonding & Ins. Co.* v. *Norwich Pharmacal Co.*, 18 F. 2d 934, 937–38 (2d Cir. 1927); 5 WIGMORE ON EVIDENCE § 1530 (1974); MCCORMICK ON EVIDENCE §§ 310–312 (1972).

To the extent that the evidence may not be admissible under the shop-book exception, it is admitted pursuant to the residual discretion of a trial court in a non-jury case to admit into evidence hearsay found to be the best evidence reasonably available and to have assurances of accuracy and reliability. *Dallas County* v. *Commercial Union Assurance Co.*, 286 F. 2d 388, 398 (5th Cir. 1961); *United States* v. *25.406 Acres of Land*, 172 F. 2d 990, 995 (4th Cir.), *cert. denied*, 337 U.S. 931 (1949), 5 MOORE'S FEDERAL PRACTICE ¶43.02[3] at 1316, (2d ed. 1974). Such residual discretion is codified in the new Federal Rules of Evidence, effective July 1, 1975. Rules 803(24), 804(b)(5), 88 Stat. 1926, 1942, 1944 (1975), 28 U.S.C. A. App.; see S. REP. No. 93–1277, 93d Cong., 2d Sess. 18–20. The findings upon which these rules condition admissibility have been made in the findings.

Plaintiff is not entitled to recover.

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CONCLUSION OF LAW

Upon the findings of fact and the foregoing opinion, which are adopted by the court and made a part of its judgment herein, the court concludes as a matter of law that the plaintiff is not entitled to recover and the complaint is dismissed.

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530 F. 2d 934

PENGUIN INDUSTRIES, INC. v. THE UNITED STATES

[No. 198-74. Decided February 18, 1976]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Contracts; default termination; defective workmanship.—Plaintiff contracted to supply a quantity of ignition cartridges to the Department of the Army; after testing, all lots but one were accepted. Upon refusal of plaintiff to correct the defective lot or to submit a new lot, defendant held plaintiff in default and terminated the contract. Plaintiff had allowed excessive glue to accumulate within the flash tube so as to impede passage of the flash needed to ignite the cartridge. This case is before the court for Wunderlich Act review of a decision of the Armed Services Board of Contract Appeals sustaining the partial termination and holding that plaintiff's failure to meet specifications was a result of its faulty manufacturing process rather than deficiency in the data package. It is *held* that the termination was proper because plaintiff construed the contract terms too narrowly when it contends that it had only to meet the specifications set out in the contract. Although the contract did not specify the quantity of glue to be used or the method of application, it was up to plaintiff to devise a method of gluing the flash tube to the disk, using its own judgment, experience and know-how. It was plaintiff's poor workmanship which resulted in the problems. Plaintiff's motion for summary judgment is denied, defendant's cross-motion is granted, and the petition is dismissed.

Contracts; inspection of work; duty of contractor.

[1] Inspections of work are for the benefit of the Government, not the contractor, and failure of the Government to provide for an inspection does not relieve the contractor of its responsibilities under the contract.

United States ⟸ 70(32)

Per Curiam

Contracts; specifications; design v. performance specifications.

[2] Where the Government provided detailed specifications for ignition cartridges but did not spell out in detail the manufacturing processes by which they were to be fabricated, such as the method of gluing the flash tube to the disk, with respect to this limited aspect, the contract was more like a performance contract than a design contract and, as in a performance contract, the contractor must assume responsibility for the means and methods selected to achieve the end result. The contractor had the obligation to adopt and use a process of gluing that would achieve, in a workmanlike manner, a functional cartridge.

United States ⟸ 70(9), 72(7)

Frederick D. Sarkis, attorney of record, for plaintiff.

Michael J. Rubin, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before DAVIS, NICHOLS, and KASHIWA, *Judges*.

PER CURIAM: This case comes before the court on defendant's motion, filed November 10, 1975, moving that the court adopt, as the basis for its judgment in this case, the recommended decision filed September 26, 1975, by then Trial Judge Hal D. Cooper (since resigned), pursuant to Rule 166(c), plaintiff having failed to file a request for review by the court thereof and the time for so filing having expired. Upon consideration thereof, without oral argument, since the court agrees with the trial judge's recommended decision, as hereinafter set forth, it hereby grants defendant's motion and affirms and adopts the recommended decision as the basis for its judgment in this case. It is therefore concluded that plaintiff has failed to show that the findings and decision of the Armed Services Board of Contract Appeals, sustaining the partial termination by default of plaintiff's supply contract, are unsupported by substantial evidence or that the Board acted arbitrarily or capriciously or that the conclusion reached is erroneous as a matter of law and, accordingly, plaintiff's motion for summary judgment is denied, defendant's cross-motion is granted and plaintiff's petition is dismissed.

Opinion of Trial Judge

OPINION OF TRIAL JUDGE

COOPER, *Trial Judge:* Plaintiff appeals, under Wunderlich Act standards,[1] an opinion by the Armed Services Board of Contract Appeals sustaining the partial termination for default of plaintiff's supply contract.[2] Having failed to show that the Board's findings are unsupported by substantial evidence or that the Board acted arbitrarily or capriciously or that the conclusion reached is erroneous as a matter of law, plaintiff's appeal cannot be sustained and the Board must be affirmed.

Plaintiff contracted to supply a quantity of ignition cartridges. It submitted the cartridges in 27 lots, lots 1–22 and 27 having been manufactured by a subcontractor, plaintiff manufacturing only the assemblies in lots 23 through 26. When defendant tested the cartridges in accordance with a contractually specified sampling and testing plan, all of the lots, except lot 25, passed the tests and were accepted. Lot 25 was rejected. Plaintiff refused either to correct the defective cartridges or to submit a new lot, whereupon defendant held plaintiff in default and terminated the contract.

Each of the cartridges includes a flash tube assembly. The flash tube assembly consists of a cardboard tube one end of which is glued into a hole in a disk. The end of the tube is covered with a fluorescent paper. It was found that the cartridges that failed in lot 25 had an excess of glue in the flash tube assembly, and that this excess had formed a membrane across the end of the tube which restricted the flow of gases from the primer and effectively prevented ignition of the cartridge. Neither the drawings nor the detailed specification described either the amount of glue to be used to secure the flash tube to the disk, or the points to which the glue should be applied. Since the drawings and specification were silent on this point, plaintiff had devised its own gluing process. It made no inspection of the completed assemblies for excessive glue. Similarly, the assigned inspector did not monitor the gluing process or perform visual inspection for excessive glue; his inspection was limited to characteristics

[1] 68 Stat. 81, 41 U.S.C. §§ 321–22 (1970).
[2] *Penguin Industries, Inc.*, 73–2 BCA ¶10,262.

specifically mentioned in the detailed specification. Those specifications identified certain "critical", "major" and "minor" defects and prescribed the method of inspection required for each. There was no mention of glue in the flash tube as a potential defect.[3]

Plaintiff argues that the rejection of lot 25 was improper because the data package or specification under which these cartridges were produced was defective in that it neither specified glue in the flash tube as a critical defect nor specified that as a point of inspection. However, the Board found, with ample record support that selection of the method of applying the glue was left to the manufacturer; that it was readily apparent to both parties that excessive glue in the flash tube could interfere with transmission of the flash employed to ignite the cartridge; that standard manufacturing techniques could be used to apply the glue without accumulating an excessive quantity; that this is a relatively elementary task; and that it was plaintiff's poor workmanship which resulted in the problems with lot 25. Further, it appears that no other manufacturer had experienced this problem and that this was the only lot with which plaintiff had any difficulty. On these facts, which must be accepted on this appeal, plaintiff has failed to sustain its burden and the Board must be sustained in its conclusion that the data package was not defective, *Clark Grave Vault Co.* v. *United States*, 178 Ct. Cl. 52, 371 F. 2d 459 (1967).

Nor was defendant required to inspect the manner in which the glue was applied. Plaintiff was an experienced contractor and used an acceptable procedure but, with respect to lot 25, it performed poorly. Plainly, defendant is not required to provide inspection for every routine task a contractor is to perform. Inspections are for the benefit of defendant, not the contractor, and the failure of defendant to provide for an inspection does not relieve the contractor of its responsibilities under the contract. *Kaminer Constr. Corp.* v. *United States*, 203 Ct. Cl. 182, 488 F. 2d 980 (1973); *Red Circle Corp.* v. *United States*, 185 Ct. Cl. 1, 398 F. 2d 836 (1968);

[3] In light of the problem encountered with lot 25, defendant has amended the specification to specify glue in the flash tube as a potential defect and prescribed inspection procedures for this defect.

Russell R. Gannon Co. v. *United States*, 189 Ct. Cl. 328, 417 F. 2d 1356 (1969).

Plaintiff further contends that the Board erred in interpreting the contract as permitting rejection of cartridges for defective workmanship. It maintains that the contract was one for supply of an article manufactured to government specifications; that defendant could reject the cartridges only for ballistic failures resulting from a "critical" or "major" defect identified in those specifications; and that neither poor workmanship nor glue in the flash tube was, under the contract, classified as a critical or major defect.

While detailed specifications for the cartridges were provided, and certain quality assurance inspections were required the specifications did not spell out in detail the manufacturing processes by which the cartridges were to be fabricated. It was left to the contractor to use its own judgment, experience and know-how in determining how to manufacture certain aspects of the cartridge. Thus plaintiff construes the contract too narrowly when it contends that it had only to meet the specifications set out in the contract. The fact is it had to go beyond those specifications as, for example, in the case of devising a method of gluing the flash tube to the disk. As to this limited aspect, the contract was more like a "performance" contract than a "design" specification and, as in a performance contract, the contractor must assume responsibility for the means and methods selected to achieve the end result. *J. L. Simmons Co.* v. *United States*, 188 Ct. Cl. 684, 412 F. 2d 1360 (1969). In short, it had the obligation to adopt and use a process of gluing that would achieve, in a workmanlike manner, a functional cartridge. This plaintiff did, except with respect to lot 25.

Under paragraph 5 of the General Provisions, Standard Form 32, defendant had the right to inspect the articles at all times prior to acceptance and to reject any of the lots found to be defective in material or workmanship. Section 4.2.3.2.2 of the basic specification provided that if, in a ballistics test, any round failed to function for reasons attributable to cartridge failure, the lot was to be rejected. The facts are that the government's tests revealed defects in workmanship which caused cartridge failure, and that the

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defects pertained to those aspects of the work for which plaintiff must bear responsibility. Accordingly, the termination for default was proper.

The plaintiff's motion for summary judgment is denied, the defendant's cross-motion is granted and the petition is dismissed.

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531 F. 2d 505

LUTHER G. POWER, JR. v. THE UNITED STATES

[No. 439-74. Decided March 17, 1976]

ON DEFENDANT'S AND PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

Civilian pay; dismissal; administrative discretion; penalty.—Plaintiff seeks back pay and allowances and reinstatement to his position as an Army ammunition inspector. Plaintiff, who had an unblemished record of 25 years of Government service, was dismissed because he allegedly submitted false information in support of a claim for travel expense reimbursements in connection with his April 1971 transfer from Gallup, New Mexico, to Texarkana, Texas. Plaintiff's reimbursement claim included household goods cartage payments, temporary rent costs and meal expenses for his wife. On July 17, 1972 a notice of proposed removal was issued on charges that plaintiff altered the weight tickets to obtain reimbursement for 5200 pounds rather than 1280 pounds actually moved, that the temporary rent paid was $125 rather than $175 as claimed, and that he attempted to collect for meals taken by his wife covering a portion of the period when she was not with him. The Civil Service Commission hearing examiner found for plaintiff on the cartage charge, but held that the rent claim was in error by $50 and that the meal claim was improper. The CSC Regional Office and the Board of Appeals and Review affirmed the hearing examiner. On the basis of the unique facts of this case, it is *held* that the penalty of dismissal was so unconscionably disproportionate to the *de minimis* offenses committed by plaintiff as to constitute an abuse of administrative discretion. The court declines to order reinstatement in the light of the unusual nature of this case. Defendant's motion for summary judgment is denied, plaintiff's cross-motion is granted, judgment is entered for plaintiff, and the cause is remanded to the trial division to determine the amount of plaintiff's recovery.

Civilian pay; Court of Claims jurisdiction; administrative or executive decisions; review of by court.

[1] This court's review of administrative determination is limited to a finding of substantial evidence supporting the decision.

Administrative Law and Procedure ⇐ 791

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Civilian pay; administrative discretion; penalties; generally.

[2] A penalty for employee misconduct is a matter left to the discretion of the executive agency. However, a reviewing court will not uphold the agency-imposed punishment where the sanction exceeds the range of permissible punishment specified by statute or regulation or where the discipline is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion by the agency.

United States ⇐ 36

Civilian pay; administrative discretion; abuse of discretion; penalty.

[3] The test for abuse of discretion of the executive agency in the penalty imposed on an employee for misconduct necessitates a showing by the employee that the penalty is so harsh that there is an inherent disproportion between the offense and punishment. If an abuse of discretion is demonstrated, the court will set aside the penalty even where it lies within the range of penalties permitted by statute or regulation.

United States ⇐ 36(10)

Civilian pay; dismissal; abuse of discretion; what constitutes.

[4] Where a Government employee was dismissed based upon a charge, brought over a year after the alleged misconduct, of submitting false information in support of a claim for travel expense reimbursement (cartage, rent and meals), where the Civil Service Commission hearing examiner found for plaintiff on the substantial cartage charge but held that the rent claim contained an error of $50 and that the request for reimbursement for his wife's meals was improper, where it cannot be determined from the record before the court if plaintiff acted intentionally, willfully or in any way fraudulently as to the rent and meals items, for which he was never reimbursed, and where these discrepancies were of a *de minimis* character, the maximum penalty of dismissal was too harsh and an abuse of discretion. Furthermore, the delay in bringing the charges against plaintiff is a factor which should have been considered at the time of imposition of the penalty.

United States ⇐ 36

Civilian pay; dismissal; charges and reasons for dismissal; penalty.

[5] While the harsh penalty of dismissal may operate as an effective method of deterring others from defrauding the Government, at some point an unduly harsh penalty can effectively ruin the goal of deterrence. If the penalty is so harsh as to constitute an abuse rather than an exercise of discretion, it cannot be allowed to stand.

United States ⇐ 36

Philip E. McCleery, attorney of record for plaintiff. *Sheehy, Lovelace & Mayfield*, of counsel.

Donnie Hoover, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

207-954—77——10

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, and KUNZIG, *Judge*.

KUNZIG, *Judge*, delivered the opinion of the court:

In this civilian pay case plaintiff, formerly employed as an Army Ammunition inspector, contests his dismissal seeking reinstatement and back pay. The Army removed Power because he allegedly submitted false information in connection with a claim for travel expense reimbursement. We find the dismissal penalty so out of proportion to plaintiff's proven conduct that it constitutes an abuse of discretion by defendant. Accordingly, plaintiff is entitled to recover back pay.

The instant case stems from plaintiff's April 1971 transfer from Fort Wingate Army Depot in New Mexico to Red River Army Depot (Red River) at Texarkana, Texas. On June 4, 1971, following his transfer, plaintiff submitted a claim for travel expenses at the Red River Finance and Accounting Office. This claim included requests for reimbursement of household goods cartage payments, temporary rent costs and meal expenses. It is undisputed that plaintiff did not personally fill out the claim voucher. Instead, pursuant to Red River practice, he provided supporting documents to Mrs. Mary A. Goodman, a clerk at the Red River Finance and Accounting Office. Mrs. Goodman "filled out" the voucher.

After its preparation, Mrs. Goodman gave the voucher and supporting documents to her supervisor who noted that certain "weight tickets" for the household goods cartage had apparently been altered. Believing that plaintiff had altered the documents in an attempt to defraud the Government, the supervisor triggered an investigation by the CID and the FBI into plaintiff's claim.

One year later, on July 17, 1972, the Army issued a notice of proposed removal. Defendant accused plaintiff of submitting false information in connection with the claims. The charges related to claims for (1) cartage, (2) rent, and (3) meals. Specifically, the Army contended that plaintiff had moved only 1280 pounds of household goods, but altered the weight tickets in an attempt to obtain reimbursement for

5200 pounds. Further, defendant accused Power of claiming $175 for temporary lodging in May 1971 when in fact he had paid only $125. Finally, the Army claimed that Power had attempted to collect for meals taken by his wife during the move although he was not entitled to such reimbursement.[1]

On September 18, 1972, the Army removed plaintiff on the basis of these charges.

During the course of subsequent administrative proceedings, various facts emerged. The Civil Service Commission (CSC) hearing examiner determined that defendant failed to prove any alteration of the weight tickets and *found for plaintiff on the substantial cartage charge*. However, he held that the rent claim contained an error of $50 and, further, that Power's request for reimbursement for his wife's meals was improper.[2] Concluding that plaintiff had submitted false information in connection with the claims for rent and meals, the examiner upheld the Army's decision to remove plaintiff. The CSC Dallas Region appeals examiner and the CSC Board of Appeals and Review affirmed the hearing examiner.

Plaintiff subsequently brought the present action to contest the administrative determinations. He attacks his removal primarily on two levels. First, contends plaintiff, defendant failed to establish guilt based on the offenses charged. Second, even if the charges were substantiated, the penalty of dismissal was unduly harsh.

Given the unique facts of this case, we hold the penalty was so unconscionably disproportionate as to be an abuse of discretion by defendant. We therefore find for plaintiff.

Power's first attack, that defendant has not established guilt, must fail.

It is well settled that our review of administrative determinations is limited to a finding of substantial evidence sup-

[1] Thus the rent error could be as much as $50. The record fails to show the amount plaintiff specifically spent for meals for his wife. Nor did defendant correct this deficiency. A fair estimate might be about $200.00. *See* note 4, *infra*.

[2] Plaintiff had claimed reimbursement for meals taken by his wife at times when she was not specifically with him. Since under the examiner's interpretation of the regulations an employee may only obtain reimbursement for a dependent's meals when the dependent *accompanies* the spouse, the examiner concluded that Power had improperly attempted to obtain payment for certain of his wife's meals.

porting the decision. *Peters* v. *United States*, 187 Ct. Cl. 63, 408 F. 2d 719 (1969); *Powers* v. *United States*, 169 Ct. Cl. 626 (1965); *Harrington* v. *United States*, 174 Ct. Cl. 1110 (1966); *Greenway* v. *United States*, 163 Ct. Cl. 72 (1963). In the instant case, there is sufficient evidence to uphold the administrative determination of guilt despite some doubts raised by various facts in the record. Thus plaintiff's removal cannot be upset based on defendant's alleged failure to prove guilt.

Plaintiff's second argument, that his penalty was too severe, stands on different footing.

The departure point for our inquiry into the propriety of plaintiff's penalty is an analysis of the standard for review. The administrative conclusions in this case were founded on the premise that removal was appropriate in view of the offenses alleged. Plaintiff contends otherwise.

As a general rule, a penalty for employee misconduct is a matter left to the discretion of the executive agency. *Birnholz* v. *United States*, 199 Ct. Cl. 532 (1972); *Cook* v. *United States*, 164 Ct. Cl. 438 (1964); *Dulcy* v. *United States*, 149 Ct. Cl. 153, 284 F. 2d 687 (1960). However, in two situations courts will not uphold the punishment imposed by the agency. The first test for an invalid penalty is whether or not the sanction exceeds the range of permissible punishment specified by statute or regulation. *Daub v. United States*, 154 Ct. Cl. 434, 292 F. 2d 895 (1961); *Cuiffo* v. *United States*, 131 Ct. Cl. 60, 68, 137 F. Supp. 944, 950 (1955). Under the second test, courts disapprove discipline which is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion by the agency.

> It is only where the transgression is so minor, and a discharge based thereon so 'unduly harsh and unwarranted, that the dismissal could be considered as constituting an *abuse of discretion* * * * that demands redress by this court * * *.' [*Heffron* v. *United States*, 186 Ct. Cl. 474, 484, 405 F. 2d 1307, 1312 (1969)]. (emphasis added).

Recently this philosophy was reaffirmed by Judge Skelton, speaking for the court in a situation similar to the case at bar.

> In any event, we agree with plaintiff that his discharge on Count I after 22 years of satisfactory government service was too harsh and out of all proportion to the

> offense charged. We have held that a dismissal under such circumstances is an abuse of discretion, is illegal, and demands redress by this court * * *. [*Jacobowitz* v. *United States*, 191 Ct. Cl. 444, 458–59, 424 F. 2d 555, 563 (1970)].

The same test has been used in *Heffron* v. *United States*, 186 Ct. Cl. 474, 485, 405 F. 2d 1307, 1312–13 (1969); *Liotta* v. *United States*, 174 Ct. Cl. 91 (1966), and *De Nigris* v. *United States*, 169 Ct. Cl. 619, 625 (1965).

The usual test for abuse of discretion in evaluating a penalty necessitates "a showing by plaintiff that the penalty is so harsh that there is an 'inherent disproportion between the offense and punishment.'" *Grover* v. *United States*, 200 Ct. Cl. 337, 353 (1973). Further, if an abuse of discretion is demonstrated, the court will set aside the penalty even where it lies within the range of penalties permitted by statute or regulation. *Id.*

Having determined the standard of review, we turn to the facts presented in the instant case. Clearly, if plaintiff submitted false information in support of his claim for reimbursement, his dismissal was permitted by regulation.[3] If plaintiff is successfully to attack the validity of his dismissal, he must focus on the second standard discussed above: that it was an abuse of discretion for defendant to impose the maximum penalty permitted when he only committed a *de minimis* offense. We agree with plaintiff that such is the case in the instant fact situation.

At each of the administrative appeal levels, it was conclusively established that defendant failed to prove the accusations relating to alteration of weight tickets. The case for plaintiff's removal thus rested on the two remaining minor charges: the rent discrepancy and the meals complaint.

It can be argued that the voucher was in error because plaintiff paid only $125 for rent in May 1971 rather than the $175 listed on the rental receipt. However, plaintiff's submissions through Mrs. Goodman, the Red River clerk, were valid in a manner of speaking. He *had* paid out $175 for rent, but

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[3] IR 690–3(730), App. VII, Figure 1: Table of Standard Penalties. For "false statements, misrepresentation or fraud of a substantial nature * * * in the matter of * * * entitlements in official records" the minimum penalty is a ten-day suspension; the maximum penalty, removal.

apparently $50 of the payment was for a returnable deposit. Yet plaintiff was required to submit covering receipts, and the $175 receipt was the only proof he had. Whether or not plaintiff was only entitled to a $125 reimbursement, the fact remains there is no evidence in the record pertaining to his motives for submitting the $175 receipt. We cannot tell from the record if plaintiff acted accidentally, willfully or in any way fraudulently. Thus, the entire $50 incident remains somewhat in doubt.

It can also be argued that plaintiff claimed reimbursement for some meals taken by his wife during May 1971 for which he was technically not entitled to reimbursement. The hearing examiner interpreted the applicable regulations to the effect that an employee may only claim meal expense incurred by a dependent if the dependent travels with the employee. *See* note 2, *supra*. In the instant case, plaintiff's wife remained in Waco, Texas, during the month in question and only joined her husband on weekends. It thus appears that Power's claim for meals for his wife's entire month's meal expenses included amounts to which he was not entitled. Again, there is a paucity of evidence in the record as to whether Power submitted the erroneous meal claims willingly and knowingly. It is not clear whether plaintiff understood the interpretation at the time he submitted his claim. The record does not indicate that the Red River clerk or anyone else ever explained it to plaintiff. Again, there is doubt whether plaintiff *knew* he may have "padded" his reimbursement claim.

Moreover, the *de minimis* nature of the rent and meal discrepancies casts even more doubt on any possible "willfulness" on plaintiff's part. Defendant caught the discrepancies in its investigation process. *Plaintiff was never paid the extra amounts.* In any event, plaintiff could never have received the $50 "extra." He was entitled to a maximum reimbursement of $677.08 for rent and meals during his move. Plaintiff's reimburseable rent and meal expenses *other* than the $50 amounted to significantly more than this maximum. Therefore, at no time did the $50 error ever portend a loss to the Government. Against this background, it becomes even more difficult to believe Power submitted the erroneous rent claim willfully.

Plaintiff's claim for his wife's meal expenses becomes similarly *de minimis*. Once again, we cannot determine from the facts in the record precisely how much plaintiff improperly claimed for his wife's meals. We can, for purposes of evaluating the seriousness of plaintiff's alleged misconduct, derive an estimate of his wife's meals claim.[4] Again, it would appear that any excessive meal claims made by plaintiff were minor.[5]

In short, the cumulative doubts expressed above suggest that the maximum penalty imposed on plaintiff is clearly too harsh and out of all proportion.

The doubt becomes even more significant given other key facts in this case. Defendant delayed *over a year* in bringing the charges against plaintiff. During this time, it "fine tooth combed" plaintiff's submissions. While we cannot say that the delay in and of itself "taints" the present proceedings against plaintiff, it certainly is a factor which should have been considered at the time defendant imposed the penalty.

Even more serious is the defendant's manner of proceeding in the present case. Defendant joined two relatively minor charges (rent and meals) with a serious and significant accusation (the cartage alteration). After failing to sustain the serious charge, the Government continued to advocate dismissal on the basis of the two relatively insignificant charges. Perhaps defendant really wanted to remove plaintiff for the serious offense, but when it found that the facts would not so allow, it achieved the same result by use of the two *de minimis* allegations. In other words, plaintiff's punishment for the two minor offenses might well have been based upon defendant's unsupported, continuing belief that he was guilty of the serious offense. Although defendant's motive for its manner of proceeding is not readily provable, certainly the specific facts of the case at bar raise substantial questions.

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[4] Plaintiff claimed $620.04 for meals for himself and his wife. If we assume that the meal costs were fairly equal for both, the wife's May 1971 meals cost $310.02. If she spent weekends and holidays with plaintiff, she would have spent roughly one-third of May with him. Power could have claimed $103.34 for her meals. His actual claim would then be excessive by some $206.68.

[5] Plaintiff's actual claim ($867.29) was $190.21 over his maximum allowable reimbursement under the law ($677.08). If the excessive claim for the wife was $206.68, the *meal error* could only have cost defendant *$16.47* in actual dollars lost. The *rent and meal errors* combined, thus would have totaled *$66.47*.

In *Jacobowitz*, *supra*, we were confronted with a similar problem. There, an IRS agent was removed on three charges: (1) negligent failure to process taxpayers' checks; (2) falsification of time sheets; and (3) failure to make efficient use of his time. The IRS itself dropped charge number (3), but continued to press for dismissal on the other two. We found insufficient evidence in the record to support the serious charge (falsification of records) and concluded that discharge on the *de minimis* remaining charge (negligent failure to process checks) was "too harsh and all out of proportion with the offense charged." *Id.*, 191 Ct. Cl. at 458–59, 424 F. 2d at 563. The instant situation is equivalent or even worse, since the strong charge was already rejected below.

Finally, defendant brings forth one last argument. It attempts to justify plaintiff's removal as necessary to deter other expense account "padders." At oral argument, defense counsel stated that the Government seeks to "make an example" of Power. We have no quarrel with defendant's goal. Deterrence can be an effective method of preventing fraud upon the Government. However, at some point an unduly harsh penalty can effectively ruin defendant's goal of deterrence. Such a point has been reached here. Moreover, if the penalty is so harsh as to constitute an abuse, rather than an exercise of discretion, it cannot be allowed to stand. *Clark*, an exercise of discretion, it cannot be allowed to stand. *Heffron*, *supra*; *Jacobowitz*, *supra*. Even for a reason otherwise "virtuous." Plaintiff's conduct in no way justified removal. "The punishment does not fit the crime."

In summary, we are confronted with a case in which the penalty is so unconscionably disproportionate that it becomes an abuse of discretion. A plaintiff with an unblemished record of twenty-five years of Government service has been removed for submitting allegedly false information in connection with claims for travel expense reimbursement. Defendant failed to substantiate a serious charge of alteration of weight tickets, but continued to advocate dismissal based on two minor discrepancies. There is some doubt whether plaintiff actually filed *false* information, and there is even greater doubt that plaintiff submitted the *de minimis* claims *knowingly*, *intentionally* and with the purpose to defraud the Government.

Syllabus

The year's delay in bringing about plaintiff's removal poses yet another question concerning the fairness of the overly harsh penalty. Finally, defendant wishes to deter others from "padding" their expense accounts, but we doubt that "throwing the book" at plaintiff would have the desired effect.

We reemphasize that this suit is unique because of its peculiar facts. The general rule remains that the penalty imposed by the agency will be viewed as a matter within agency discretion unless such discretion is abused. Such discretion has been abused in the case at bar.

Accordingly, defendant's motion for summary judgment is denied and plaintiff's cross-motion is granted. Having carefully considered plaintiff's prayer for judgment, defendant's answer thereto, briefs, oral argument and the reinstatement power vested in us under Pub. L. 92–415, we have determined *not* to order reinstatement in this action in the light of the unusual nature of this case. Judgment is therefore entered for plaintiff, and the cause is remanded to the Trial Division for further proceedings under Rule 131(c) to determine the amount to be awarded plaintiff, consistent with this opinion.

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531 F. 2d 510

HAROLD A. MILLER, ET AL. v. THE UNITED STATES

[No. 296–74. Decided March 17, 1976]

ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND PETITION TO DISMISS COUNT 1 OF THE PETITION

Eminent domain; taking; just compensation; boundary modification; Redwood National Park Act.—Plaintiffs seek just compensation for the taking of their property pursuant to the Redwood National Park Act. The area taken includes a corridor connecting wider tracts to the north and south, and this corridor (which contains no redwoods) cuts across plaintiffs' only access to an untaken large area to the eastward and to a smaller area called the "Demonstration Forest." Defendant has filed corrective maps and the parties have made a contract purporting to remove 90.78 acres from the taking area, to restore plaintiffs' access to their untaken lands, and to enlarge the Demonstration Forest. The access route would

Syllabus

sever the north-south corridor and divide the Park, but this appears to defendant less of an evil than the asserted severance damages claim. It is agreeable to plaintiffs to take the 90.78 acres in lieu of severance damages, but they deny that defendant has power to dispose of park lands which immediately vested in the United States pursuant to the Act, relying on the usual rule that United States officials cannot dispose of Government land without express statutory authority to do so, and they also contend that defendant has not followed correct procedure even if it has such power. The problem before the court raised by Count 1 is whether or not the 90.78 acres have been effectually removed from the park and restored to plaintiffs so that they never were in the park for purposes of assessing plaintiffs' claim. It is *held* that within the meaning of the Act the Secretary of the Interior validly modified the boundaries of the Park so as to exclude from it *nunc pro tunc* from the date of enactment all 90.78 acres, more or less, referred to in Count 1, para. 7, of the petition, and for purposes of this case, the said lands are deemed never to have been taken for the Park. The cause is remanded to the trial division for further proceedings in accordance with this partial summary judgment.

Statutes; construction and operation; ordinary meaning of terms; "modify."

[1] Unless the context requires otherwise, words are construed according to their ordinary meaning in common speech, and in statutory construction courts resort to authoritative dictionaries to establish what the ordinary meaning is. As to the word "modify" appearing in Sec. 2(a) of the Redwood National Park Act, 82 Stat. 931, it is more appropriately applied to a diminution than to an increase, so far as there is a difference, according to Webster's Third Unabridged Dictionary which includes preferred meanings limited to diminution only.

Statutes ⇐ 188, 214

Woods and Forests ⇐ 8

Eminent domain; taking; Redwood National Park Act; congressional intent.

[2] There is no hopeless inconsistency or anomaly in a legislative vesting of title to land and a provision for a divesting of title by boundary revision elsewhere in the legislation, in certain circumstances, either *nunc pro tunc* or as of a later date. It is for the courts to ascertain what Congress intended to accomplish and effectuate that intent, not to distort that intent to fit preconceived notions of conveyancing propriety, such as that urged by plaintiff that by providing in the Redwood National Park Act for immediate legislative taking, Congress drastically curtailed the authority to modify boundaries and confined the modification to outward addition of land and not contraction.

Woods and Forests ⇐ 8

Opinion of the Court

Eminent domain; taking; modification of boundaries; discretion of Secretary; Redwood National Park Act.

[3] Since the purposes of the Redwood National Park Act were to save the redwoods and to assure just compensation to expropriated landowners, the boundary modification here involved which was accomplished in such a way as to avoid liability for severance damages, which did not cost any redwoods and which effectuated or brought nearer a fair and just settlement with the landowner, was within the Secretary's discretion to "modify the boundaries" as provided in the Act, as well as to modify the boundary *nunc pro tunc* with the original taking date establishing that boundary.

Woods and Forests ⟸ 8

Federal Register; documents required to be published; notice.

[4] Generally, failure to publish a notice in the Federal Register when required does not impair the validity of the executive action published as regards persons who have had actual notice.

Administrative Law and Procedure ⟸ 408

Manley B. Strayer, attorney of record for plaintiff. *Davies, Biggs, Strayer, Stoel and Boley; Tonkon, Torp and Galen;* and *Ragan and Mason*, of counsel.

Howard O. Sigmond, with whom was *Assistant Attorney General Peter Taft*, for defendant.

Before SKELTON, NICHOLS and BENNETT, *Judges*.

NICHOLS, *Judge*, delivered the opinion of the court:

Plaintiffs, owners of valuable California forest lands, bring this action for just compensation under the Redwood National Park Act, Pub. L. 90–545, 82 Stat. 931, 16 U.S.C. § 79 a–j. That Act vested in the United States immediate title to an area described by reference to maps, by legislative enactment pure and simple, uncomplicated by any necessity for subsequent executive action. The Secretary of the Interior was to settle claims of the former owners for just compensation, and in the absence of agreement, they were directed to sue in this court. Part of plaintiffs' land being thus taken, and part remaining in their ownership, their claim includes substantial sums for injury to land not taken.

The settlement negotiations brought to light an unfortunate situation. The area taken includes a narrow corridor connecting wider tracts to the north and south, and this cor-

ridor, which contains no primeval redwoods, cuts right across the plaintiffs' only access to the large area of their ownership, to the eastward, and to a smaller area, also not taken, called the "Demonstration Forest", which is surrounded by corridor lands. The authorization limit for the whole Park was $92,000,000. For the land taken, 2,737.40 acres, and damage to land not taken, plaintiffs claim $87,008,539, towards which they acknowledge payments totalling $11,687,955, in money and in exchanged lands. If the access problem can be resolved as defendant has attempted to do, the claim is only $7,669,771, but if as plaintiffs believe, it is unsolvable under existing legislation, $75,320,584 is the claim, plus interest as part of just compensation. Defendant has filed corrective maps in the state land records, and the parties have made a contract, purporting to remove 90.78 acres from the taking area, to restore plaintiffs' access to their land not taken, and to enlarge the Demonstration Forest area. The notice of this filing, in the Federal Register, describes the new maps as delineating and describing the lands taken in the legislative taking. 36 Fed. Reg. 19518 (1971). The access route would sever the north-south corridor and divide the Park in two, but this appears to defendant less of an evil than the enormous severance damage claim with which it is faced. Plaintiffs would be happy to take the 90.78 acres in lieu of the severance damages, but deny that defendant has power to dispose of park lands vested in the United States in this manner, or that it has followed the correct procedure even if it has such power.

The case is before us on cross motions for partial summary judgment. The facts are undisputed and the issue seems an appropriate one for disposition by that medium, preliminary to a trial on the value of the land taken, if one is necessary. Our problem is, therefore, to determine whether or not the 90.78 acres have been effectually removed from the park and restored to private ownership, so that they never were in the park for the purposes of assessing plaintiffs' claim. We hold that this is the result.

The text of Redwood National Park Act, Secs. 2 (a) and 3(b)(1) are both important and read as follows:

> Sec. 2. (a) The area to be included within the Redwood National Park is that generally depicted on the maps en-

titled "Redwood National Park," numbered NPS–RED–7114–A and NPS–RED–7114–B, and dated September 1968, copies of which maps shall be kept available for public inspection in the offices of the National Park Service, Department of the Interior, and shall be filed with appropriate officers of Del Norte and Humboldt Counties. The Secretary of the Interior (hereinafter referred to as the "Secretary") may from time to time, with a view to carrying out the purpose of this Act and with particular attention to minimizing siltation of the streams, damage to the timber, and assuring the preservation of the scenery within the boundaries of the national park as depicted on said maps, modify said boundaries, giving notice of any changes involved therein by publication of a revised drawing or boundary description in the Federal Register and by filing said revision with the officers with whom the original maps were filed, but the acreage within said park shall at no time exceed fifty-eight thousand acres, exclusive of submerged lands.

Sec. 3. * * *

(b) (1) Effective on the date of enactment of this Act, there is hereby vested in the United States all right, title, and interest in, and the right to immediate possession of, all real property within the park boundaries designated in maps NPS–RED–7114–A and NPS–RED–7114–B, except real property owned by the State of California or a political subdivision thereof and except as provided in paragraph (3) of this subsection. The Secretary shall allow for the orderly termination of all operations on real property acquired by the United States under this subsection, and for the removal of equipment, facilities, and personal property therefrom.

Defendant with its cross motion furnishes copies of Maps NP–RED–7114–A and –B, which are now conceded to be the maps Congress referred to. The "S" in "NPS" was an inadvertent error in the statute, but without legal significance.

Defendant relies on the authority given in Sec. 2(a) to "modify" the park boundaries, as the source of power to exclude the 90.78 acres. Omitting for the moment procedural questions, plaintiffs' point is that by the Act's own language, Sec. 3(b) (1), "all right, title and interest in" the land, within the boundaries shown on the maps, vested in the United States. It relies then on the usual rule that United States officials cannot dispose of Government land without express statutory authority to do so.

As to the immediate vesting of title our decisions in *Drakes Bay Land Co.* v. *United States*, 191 Ct. Cl. 389, 424 F. 2d 574 (1970), and *Rocca* v. *United States*, 205 Ct. Cl. 275, 500 F. 2d 492 (1974), do not bear the weight plaintiffs put on them. In the former case we were discussing other legislation and in pointing out that the Redwood National Park Act was different in vesting immediate title, we had no reason to spell out whatever minor qualifications there might be to that statement. In *Rocca*, likewise, we were explaining the differences between the takings under the Redwood Act and those made in what is called "inverse condemnations", *i.e.*, where the claimant suing under the Tucker Act, 28 U.S.C. § 1491, must show whether the Government has taken at all, and if so, when. Such statements, wrenched from their original context, cannot be fathered on the court in wholly different contexts.

We may concede, however, that in the absence of Sec. 2(a), the plaintiffs clearly would be right. The most immediately relevant authority is *United States* v. *Sunset Cemetery Co.*, 132 F. 2d 163, 164 (7th Cir. 1943). That case deals with the Declaration of Taking Act, 40 U.S.C. § 258, and holds that before § 258(f) was added in 1942, a Declaration purporting to take a fee was irrevocable and the interest taken could not be diminished by amendment. § 258(f) was added to allow effect to be given to a stipulation or agreement by the Attorney General to exclude any property or any part thereof, or interest therein. § 258(f) does not apply to this case except as showing how Congress has dealt with the instant problem when it recognized tis existence. Sec. 2(a) of the Redwood Act is less clear.

Plaintiffs point out that the Senate and House bills that became the Redwood Act both laid out general areas by reference to a map, but without any legislative taking. Land was to be purchased or condemned within the areas for the park from time to time, *i.e.*, the scheme was like that discussed by us in *Drakes Bay Land Co.*, *supra*. The Senate bill allowed the Secretary to make "boundary revisions" which were to be "minor adjustments", but limited to not over the park area, as contemplated, of 64,000 acres. The Secretary was not to depart from the "general boundaries described in

the bill to make major acquisitions * * *" Senate Rep. No. 641, U.S. Code Cong. & Adm. News, Vol. 3 (1968), p. 3928.

The House bill was similar but provided a smaller ultimate area. The Conference Committee figure of 58,000 acres was a compromise. But the Conference Committee added a feature that was not in either the Senate or House bills: the immediate legislative taking. The reason for this was perception of an "emergency" in concern lest cutting of "these precious trees" would go on after enactment pending further legislative and administrative measures, because title would not at once vest in the United States. Speech of Senator Jackson, Committee Chairman, Cong. Rec., Sept. 19, 1968, p. 27583. Another reason was to stop land price escalation on the taking date. *See*, Cong. Rec., *supra*, at 27582.

Plaintiffs apparently believe that by the introduction of the legislative taking the Congress drastically curtailed the authority to modify boundaries, though it remained stated in similar terms. Before this change, no doubt, the boundary could be readily moved outwards or inwards, at least at the outset, because no title vested in the United States until, at some later date, a declaration of taking was filed which would vest it, or until a court decree was obtained in a condemnation case, or a deed obtained from a grantor. In plaintiffs' view, under the law as enacted, the boundary could be moved only outwards, to add land to the legislative taking, not inward to subtract. This would greatly reduce the scope of the authority, though plaintiffs also call attention to the heavy, broad lines the Conference Committee drew on the map. Blown up to full size on the ground, these lines would become strips of substantial width, whose ownership the Secretary would need to establish.

Of course, outward modification of the lines would soon run up against the statutory 58,000 acres overall limitation unless it was matched by inward modification elsewhere. The Conference Committee enumerated areas which add up to 55,625 acres. This includes three state parks but not the highways the state was expected to donate. 3 U.S. Code Cong. & Adm. News (1968) at 3934. Thus plaintiffs would allow the modification authority but a limited scope indeed. The rule of giving full effect to every part of an enactment

does not, in plaintiffs' view, have so much force when it is a question of language added by a Conference Committee to meet a perceived emergency, subverting language that was in the bill all along.

We are impressed by the ingenuity of this analysis, but do not think it is sound. In the first place, the statutory word "modify" is more appropriately applied to a diminution than to an increase, so far as there is a difference. Webster's definitions in the Third Unabridged Ed. include several preferred meanings limited to diminution only. *E.g.*, "1. To make more temperate and less extreme * * * 3a To limit or restrict the meaning of." No definition is limited to increase only. Unless the context requires otherwise, words are construed according to their ordinary meaning in common speech, and in statutory construction, courts resort to authoritative dictionaries to establish what the ordinary meaning is. For a recent instance, *see State Bank of Albany* v. *United States*, *ante* at 13. Our resort to the dictionary adduces no support for the meaning of "modify" urged by plaintiffs, which would confine it to instances of expansion only and exclude contraction.

> * * * It is true that a court in interpreting a provision in a statute may imply an exception to general terms used therein, but it will do so only where to apply the general term literally would lead to absurd results, contrary to the manifest Congressional purpose as revealed by the statute as a whole and as confirmed by its legislative history. * * * (*Otoe and Missouria Tribe of Indians*, 131 Ct. Cl. 593, 608, 131 F. Supp. 265, 275, *cert. denied*, 350 U.S. 848 (1955)).

In the second place, the Conference Committee did not report the bill with the authority to "modify" still in it by mere haste and inadvertence. The Committee's section by section analysis says the Secretary "may periodically adjust the boundaries of the park." Cong. Rec., Sept. 19, 1968, p. 27579. Use of the word "adjust" instead of "modify" shows that the writer of the analysis did not merely parrot the language of the bill without thinking about it.

Third, this present case illustrates that, as Congress could not but have seen, the sudden and flat-out taking of title on enactment would increase and not diminish the need for authority to make "adjustments", moving the line either in

or out as the occasion might demand. It would be strange to amend the bill to take away a power granted in prior versions, while increasing the need for that power.

Fourth, there is no hopeless inconsistency or anomaly in vesting title absolutely, yet providing for a divesting of title by boundary revision elsewhere in the legislation, in certain circumstances, either *nunc pro tunc* or as of a later date. It is for the courts to ascertain what Congress intended to accomplish and effectuate that intent, not to distort that intent to fit preconceived notions of conveyancing propriety. As defendant appropriately quotes:

> * * * Yet it will not do for us to tell the Congress "We see what you are driving at but you did not use choice words to describe your purpose." (*United States* v. *Union Pacific R. Co.*, 353 U.S. 112, 118 (1957)).

Looking, as we must, for the intent of Congress as our guiding star, the supposed difficulty about divesting an absolute title does not impress as a valid reason why Congress would not have wanted the Secretary to use his power to modify the Park boundaries as he has used it here.

Plaintiffs' only other substantive point we should notice is that the saving of liability for severance damages is not a "purpose of the Act" for which the Secretary can "modify" a boundary. The Act recites that the purpose is to save the redwoods. A secondary purpose, for which full provision was made in the statute, was to assure just compensation to expropriated landowners. We presume the purposes of any Act are those shown by its terms and history to be the express concern of Congress. The modification here involved did not cost any primeval redwoods and it was done to effectuate or bring nearer a fair and just settlement with an important claimant, one whose claim Congress anticipated with concern. We think the choice of this measure was within the Secretary's discretion and effectuated a purpose of the Act.

We think the Secretary's discretion was also broad enough to modify the boundary *nunc pro tunc* with the original taking date which established that boundary. It is necessary that he do so here to effectuate the object of eliminating severance damages. Thus the title to the involved 90.78 acres remains continuously in the plaintiffs with no period of Government

ownership. Since the statute authorizes the Secretary to modify "from time to time", what he may do after the original taking claims are settled, and for other purposes, does not concern us here.

The plaintiffs' procedural points are two. First, the Secretary failed to give notice of the boundary changes here involved by publication in the Federal Register, as required, either of a revised drawing or a "boundary description". He published there, in fact, a brief notice referring to maps that were available for consultation elsewhere. We find it unnecessary to determine whether he complied with the Act because in any event, we do not consider that a person who received actual notice has standing to complain that notice by publication was not given. Clearly the plaintiffs had actual notice. As a normal matter, failure to publish a notice in the Federal Register when required does not impair the validity of the executive action published as regards persons who have had actual notice. 44 U.S.C. § 1507. The instant legislation cannot be read to create an anomalous exception to this rule.

Second, plaintiffs urge that the Secretary failed to make proper delegations of authority to the persons who modified the boundaries and published the Register notice and the maps. The defendant seems to have effectually refuted the objection, or else shown ratification, by the matter submitted with its cross motion.

In accordance with the foregoing, plaintiffs' motion for partial summary judgment is denied. Defendant's motion to dismiss or for partial summary judgment is allowed. Count 1 of plaintiffs' petition is dismissed. It is determined and adjudicated that within the meaning of the Redwood National Park Act, the Secretary of the Interior has validly modified the boundaries of the said Park so as to exclude from it *nunc pro tunc* from the date of enactment, October 2, 1968, all the lands of the plaintiffs, amounting to 90.78 acres, more or less, referred to in the said Count 1, paragraph 7. For purposes of this case, the said lands are deemed never to have been taken for the said Park. The cause is remanded to the trial division for further proceedings in accordance with this partial summary judgment.

Syllabus

531 F.2d 515

FCX, INC. v. THE UNITED STATES

[No. 440–72. Decided March 17, 1976. Plaintiff's motion for reconsideration denied April 23, 1976]

OPINION

Taxes; income tax; deductions; cooperatives; patronage dividends and refunds.—This case is before the court on a stipulation of facts. Plaintiff, a non-exempt farmer's cooperative, seeks refund of income taxes and interest for fiscal years 1967 and 1968, during which years it paid dividends on its preferred stock out of earnings from non-member patronage and non-patronage sources, and also made patronage refunds to its patron members of all of the money it received from them. Under Secs. 1381–1388 of the Internal Revenue Code of 1954 (Subch. T), plaintiff may deduct patronage dividends from gross income in computing its taxable income. Plaintiff deducted dividends on its preferred stock solely from the earnings from business done with non-member patrons and from earnings from other non-patronage sources in computing its patronage refund, its by-laws so providing. The Internal Revenue Service disallowed a portion of the amounts claimed as patronage refunds. In adopting the reasoning and decisions in *Des Moines County Farm Services Co.* v. *United States*, 448 F. 2d 776 (8th Cir. 1971), *affirming* 324 F. Supp. 1216 (S.D. Iowa), and *Union Equity Cooperative Exchange* v. *Commissioner*, 481 F. 2d 812 (10th Cir. 1973), *cert. denied*, 404 U.S. 1028, and in distinguishing *United States* v. *Mississippi Chem. Co.*, 326 F. 2d 569 (5th Cir. 1964), it is *held* that plaintiff was required to deduct dividends paid on its capital stock ratably from all of its net earnings in computing the allowable patronage dividend deduction for federal income tax purposes during fiscal years 1967 and 1968. It is also *held* that the determination by the Commissioner of Internal Revenue of the income tax owed by plaintiff during those years was correct. Judgment is entered for defendant, plaintiff's claim is denied, and the petition is dismissed.

Taxes; income tax; cooperatives; gross income, exclusions from; patronage dividends.

[1] Allowance of patronage dividends to nonexempt cooperatives as an exclusion from its gross income was an approved administrative practice, and in enacting Subch. T of the Internal Revenue Code of 1954 Congress merely codified such practice. However, the legislative history of Sec. 1388(a) of the Code demonstrates the clear intent of Congress to exclude amounts paid from earnings other than from business done with or for patrons.

Internal Revenue ⇐ 513

Taxes; Treasury Regulations; cooperatives; patronage dividends.

[2] Rev. Rul. 68–228 and Treas. Reg. § 1.1388–1(a)(1) requiring a cooperative organization in determining the amount of patronage fendant, planitiff's claim is denied, and the petition is dismissed.

Syllabus

dividend to reduce its net earnings by dividends paid on capital stock and that only net earnings so reduced are to be apportioned between the various relevant sources, are consistent with Subch. T of the Internal Revenue Code of 1954 and are reasonable and valid.

Internal Revenue ⇐ 513

Constitutional law; due process of law—Fifth Amendment; taxation of income; cooperatives; patronage dividends.

[3] Since plaintiff, a nonexempt cooperative, is not in the same class as and receives benefits not given to ordinary corporations, such as patronage dividend deductions in addition to deductions allowed ordinary corporations, Treas. Reg. § 1.1388–1(a) providing for computation of the special patronage dividend deduction is constitutional and does not deny plaintiff equal protection of the law, there being no discrimination between plaintiff and other cooperatives in the same class.

Constitutional Law ⇐ 229.2

Taxes; income tax; deductions; trade or business expense; cooperative patronage refunds.

[4] Where plaintiff, a nonexempt cooperative, made patronage refunds to its patron members of all of the money it received from them, any further distribution to members cannot be considered a rebate and deductible under Sec. 162 of the Code, since such distribution would have to be made out of earnings from sources other than from the members.

Internal Revenue ⇐ 504

Taxes; income tax; cooperatives; deductions; patronage dividends.

[5] Cash dividends paid on capital stock of plaintiff, a nonexempt cooperative, must be deducted ratably from earnings from all sources (member, non-member and non-patronage) in computing the allowable patronage dividend deductions for federal income tax purposes during the taxable years in issue.

Internal Revenue ⇐ 513

Richard A. Mullens, for plaintiff. *Charles W. Schoeneman*, attorney of record. *Sanford, Cannon, Adams & McCullough*, of counsel.

Charles A. Auslander, Jr., with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser* and *Donald H. Olson*, of counsel.

Before COWEN, *Chief Judge*, SKELTON and BENNETT, *Judges*.

Opinion of the Court

SKELTON, *Judge*, delivered the opinion of the court:

This is a suit by plaintiff, FCX, Inc., of Raleigh, North Carolina, for refund of income taxes and interest thereon. Plaintiff is a nonexempt farmer's cooperative having retail, wholesale, and manufacturing operations and facilities in North and South Carolina and franchised dealers in both states. It has the accrual method of accounting with its fiscal year ending June 30.

During the fiscal years of 1967 and 1968, plaintiff paid dividends on its preferred stock of $469,365 and $477,202, respectively, out of earnings from non-member patronage and from non-patronage sources. During the same years plaintiff made patronage refunds to its patron members of $981,433.02 and $855,165.09, respectively. These refunds were paid from gross income attributable to member patronage. After audit of plaintiff's books by the Internal Revenue Service for these years, a portion of the amounts claimed as patronage refunds was disallowed. The plaintiff filed claims for refund, which were disallowed, and thereafter timely filed this suit to recover $122,639 and $126,579 for the taxable years 1967 and 1968, respectively.

The question to be decided is, whether, as the Government contends, dividends paid on capital stock of a non-exempt cooperative corporation must be deducted ratably from its earnings from all sources in computing the allowable patronage dividend deduction for federal income tax purposes, or whether for such purpose taxpayer was entitled to allocate capital stock dividends only to earnings from sources other than member patronage?

The facts in the case are stipulated and the issue before us is one of law. The case presents a question of first impression in this court, although other courts have considered and decided it in other cases, as will be shown below.

Plaintiff, as a nonexempt cooperative, is given special federal income tax treatment not afforded ordinary business corporations, in that under Sections 1381 through 1388 of the Internal Revenue Code of 1954 (Subchapter T), which was added to the Code by Section 17(a) of the Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 960, it may deduct patronage dividends from gross income in computing its

taxable income. Patronage dividends are defined in Section 1388(a) as follows:

> § 1388. Definitions; special rules.
>
> (a) Patronage dividend.
>
> For purposes of this subchapter, the term "patronage dividend" means an amount paid to a patron by an organization to which part I of this subchapter applies—
>
> (1) on the basis of quantity or value of business done with or for such patron,
>
> (2) under an obligation of such organization to pay such amount, which obligation existed before the organization received the amount so paid, and
>
> (3) which is determined by reference to the net earnings of the organization from business done with or for its patrons.
>
> Such term does not include any amount paid to a patron to the extent that (A) such amount is out of earnings other than from business done with or for patrons, or (B) such amount is out of earnings from business done with or for other patrons to whom no amounts are paid, or to whom smaller amounts are paid, with respect to substantially identical transactions. [26 U.S.C. § 1388(a) (1970).]

Prior to 1951, no statute recognized or sanctioned a deduction or exclusion of patronage dividends from the gross income of a cooperative. Nevertheless, the allowance of patronage dividends to nonexempt cooperatives had been an approved administrative practice for many years. *Farmers Cooperative Co.* v. *Birmingham*, 86 F. Supp. 201 (N.D. Iowa 1949); *Puget Sound Plywood, Inc.*, 44 T.C. 305 (1965); *Consumers Credit Rural Electric Cooperative Corp.*, 37 T.C. 136 (1961), *rev'd and remanded*, 319 F. 2d 475 (6th Cir. 1963), *on remand*, 23 T.C.M. 149 (1964). *See also* T.D. 2737, 20 Treas. Dec. Int. Rev. 441 (1918) dealing with the exclusion of patronage dividends paid by cooperatives to their patrons. In 1951, the first statutory provision recognizing the prior administrative practice with reference to patronage dividends of cooperatives was contained in the Revenue Act of 1951, ch. 521, § 314(a), 65 Stat. 452. This Act added subparagraph (B) to Section 101(12) of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.).

The first statute that permitted a nonexempt cooperative to deduct patronage dividends was the Revenue Act of 1962, Pub. L. No. 87–834, 76 Stat. 960. Section 17(a) of this Act added subchapter T to the Code of 1954, containing Sections 1381 through 1388, which controls the taxable years involved in this case. Section 1382(b) allows a nonexempt cooperative to reduce its taxable income by the payment of a qualifying patronage dividend, which is defined in Section 1388(a), quoted above.

A reading of Section 1388(a) shows that it defines patronage dividends as amounts paid to a patron of a cooperative (1) on the basis of quantity or value of business done with or for such patron, (2) where the cooperative is under a preexisting obligation to pay such amount, and (3) the payment is determined by reference to the net earnings of the cooperative from business done with or for its patrons. The definition expressly excludes amounts paid from earnings other than from business done with or for patrons. Such exclusion was clearly intended by Congress as shown by H.R. Rep. No. 1447, 87th Cong., 2d Sess., A133 (1962–3 Cum. Bull. 405, 631) and S. Rep. No. 1881, 87th Cong., 2d Sess., 316–17 (1962–3 Cum. Bull. 707, 1020–21), wherein it is stated:

> It is made clear that there are not to be included as patronage dividends any amounts which are out of earnings other than from business done with or for patrons, or any amounts paid to patrons which are attributable to the patronage of other patrons to whom no amounts are paid, or to whom smaller amounts are paid, with respect to substantially identical transactions. *Thus, if a cooperative does not pay any patronage dividends to nonmembers, any portion of the amounts paid to members which is out of net earnings from patronage with nonmembers, and which would have been paid to the nonmembers if all patrons were treated alike, is not a patronage dividend.* [Emphasis supplied.]

In this case, the plaintiff deducted dividends on its preferred stock solely from the earnings from business done with nonmember patrons and from earnings from other nonpatronage sources in computing its patronage refund. Plaintiff contends that Article VI, Section 4 of its By-Laws authorized it to follow this procedure in the following language:

> Net earnings attributable to non-member patronage and to sources other than patronage * * * shall be applied firstly to payment of dividends on capital stock, * * *.

The Government contends that in computing its patronage dividend deduction, plaintiff must ratably reduce its earnings from *all* sources by the amount of dividends paid on its preferred stock, and that the provisions of its By-Laws are not controlling as to what constitutes a true patronage dividend under federal tax law. Magill and Merrill, *The Taxable Income of Cooperatives*, 49 Mich L. Rev. 167 (1950).

It appears that the formula for computing the patronage dividend deduction under the facts of this case is indicated in long-standing administrative rulings as far back as 1924 (S.M. 1551), restated in A.R.R. 6967, III–I Cum. Bull. 287, 289 (1924) as follows:

> First compute the apparent net income of the cooperative association. From this amount deduct the fixed dividend paid or payable on any outstanding capital stock. The amount of such fixed dividend is the portion of net income properly attributable to the investment made in the association by the holders of any outstanding capital stock.
>
> The balance consists of (1) the amount available for refund to the members of the association and (2) the profits made from nonmembers. In the absence of evidence to the contrary, it will be assumed that the dealings with members and nonmembers are equally profitable, and, accordingly, that the amount available for refund consists of that proportion of the apparent net profits, after deducting the fixed dividend on outstanding capital stock, which the amount of business transacted with members bears to the entire amount of business transacted. Up to the amount available for refund thus computed, a distribution by a cooperative association to its members, upon the basis of the business transacted with them, will be deemed to be a true patronage dividend, deductible by the association in computing its taxable net income for Federal income and profits tax purposes.

Prior to the enactment of subchapter T, A.R.R. 6967 was approved in *Valparaiso Grain & Lumber Co.*, 44 B.T.A. 125 (1941); *Farmers Union Cooperative Exchange*, 42 B.T.A.

1200 (1940); and *Trego County Cooperative Ass'n*, 6 B.T.A. 1275 (1927). The formula set forth in A.R.R. 6967 quoted above has been republished in Rev. Rul. 68–228, 1968–1 Cum. Bull. 385. The plaintiff argues that Rev. Rul. 68–228, as well as Section 1.1388–1(a)(1) of Treasury Regulations on Income Tax promulgated under subchapter T are invalid. Section 1.1388–1(a) of the Regulations provide as follows:

> § 1.1388–1 *Definitions and special rules.*
>
> (a) *Patronage dividend*—(1) *In general.* The term "patronage dividend" means an amount paid to a patron by a cooperative organization subject to the provisions of part I, subchapter T, chapter 1 of the Code, which is paid—
>
> (i) On the basis of quantity or value of business done with or for such patron,
>
> (ii) Under a valid enforceable written obligation of such organization to the patron to pay such amount, which obligation existed before the cooperative organization received the amount so paid, and
>
> (iii) Which is determined by reference to the net earnings of the cooperative organization from business done with or for its patrons.
>
> For the purpose of subdivision (ii) of this subparagraph, amounts paid by a cooperative organization are paid under a valid enforceable written obligation if such payments are required by State law or are paid pursuant to provisions of the bylaws, articles of incorporation, or other written contract, whereby the organization is obligated to make such payment. The term "net earnings," for purposes of subdivision (iii) of this subparagraph, includes the excess of amounts retained (or assessed) by the organization to cover expenses or other items over the amount of such expenses or other items. For purposes of such subdivision (iii), net earnings shall not be reduced by any taxes imposed by subtitle A of the Code, but shall be reduced by dividends paid on capital stock or other proprietary capital interests.
>
> (2) *Exceptions.* The term "patronage dividends" does not include the following:
>
> (i) An amount paid to a patron by a cooperative organization to the extent that such amount is paid

out of earnings not derived from business done with or for patrons.

(ii) An amount paid to a patron by a cooperative organization to the extent that such amount is paid out of earnings from business done with or for other patrons to whom no amounts are paid, or to whom smaller amounts are paid, with respect to substantially identical transactions. Thus, if a cooperative organization does not pay any patronage dividends to nonmembers, any portion of the amounts paid to members which is out of net earnings from patronage with nonmembers, and which would have been paid to the nonmembers if all patrons were treated alike, is not a patronage dividend.

(iii) An amount paid to a patron by a cooperative organization to the extent that such amount is paid in redemption of capital stock, or in redemption or satisfaction of certificates of indebtedness, revolving fund certificates, retain certificates, letters of advice, or other similar documents, even if such documents were originally paid as patronage dividends.

(iv) An amount paid to a patron by a cooperative organization to the extent that such amount is fixed without reference to the net earnings of the cooperative organization from business done with or for its patrons.

* * * * *

It is clear that A.R.R. 6967, and Rev. Rul. 68–228 and Section 1.1388–1(a)(1) require that a taxpayer, such as plaintiff here, in determining the amount of patronage dividend, must reduce the net earnings by dividends paid on capital stock, and that only net earnings so reduced are to be apportioned between the various relevant sources. We conclude that the revenue rulings and the regulations promulgated under subchapter T are consistent with the statute and are reasonable and valid.

The identical problem involved in this case was decided in favor of the Government by the Tax Court and the Eighth and Tenth Circuit Courts of Appeal in two cases that are, for all practical purposes, on "all fours" with the instant case, namely, *Des Moines County Farm Service Co.* v. *United States*, 448 F. 2d 776 (8th Cir. 1971), *affirming*, 324 F. Supp. 1216 (S.D. Iowa); and *Union Equity Cooperative Exchange*

v. *Commissioner*, 481 F. 2d 812 (10th Cir. 1973), *cert. denied*, 414 U.S. 1028. We agree with the reasoning and decisions of the courts in those cases. In both cases the by-laws of the taxpayers provided that dividends on capital stock should first be paid out of earnings from sources other than member patronage, as in the instant case. The pertinent and controlling facts in those cases were, for all practical purposes, identical with the facts in the case before us. The decisions in those cases are strong precedents for our decision here. In the *Des Moines* case, the court, after reviewing the facts, held:

> * * * The administrative practice of the Commissioner has always been to require corporations operating as nonexempt farmers' cooperatives to reduce "apparent" net income by the amounts paid as dividends on capital stock when making the patronage dividend exclusion computation. See *Valparaiso Grain & Lumber Co.* v. *Commissioner of Internal Revenue*, 44 B.T.A. 125, 127 (1941) and Rev. Rul. 68-228, 1968-1 Cum. Bull. 385. This administrative precedent has been judicially sanctioned. See *Farmers Cooperative*, *supra*. [86 F. Supp. 201 (N.D. Iowa 1949)]. Because Congress, in enacting Subchapter T, merely codified the prior administrative practice of the Commissioner, there is little basis on which to conclude that Congress intended to discard the long established method of computing the exclusion. Thus, under the spirit—if not the letter—of the reenactment doctrine, Congress must be taken to have approved the foregoing administrative and judicial constructions—not embodied in § 1.1388-1(a) (1)—and thereby to have given it the force of law. See *United States* v. *Correll*, 389 U.S. 299, 305-306, 88 S. Ct. 445, 19 L. Ed. 2d 537 (1967); *Fribourg*, *supra*, [383 U.S. 272 (1966)] and the cases cited therein at 283 of 383 U.S., 86 S. Ct. 862.
>
> (5) The regulation is reasonable and consistent with the statute on which it is based. This without more is sufficient to validate it. See *Bingler* v. *Johnson*, 394 U.S. 741, 749-750, 89 S. Ct. 1439, 22 L. Ed 2d 695 (1969). [324 F. Supp. at 1219-20.]

The court further held:

> After careful consideration of the pleadings and briefs and of the dearth of pertinent legislative history as affected and promoted by contemporaneously decided

cases and administrative interpretations, the Court reaches the conclusion that § 1.1388–1(a)(1) must be sustained as a valid and reasonable construction of the statute which it was designed to implement. Thus, to the extent that payment of capital stock dividends is not charged ratably against all net earnings, the total amount paid or allocated member-patrons as patronage dividends by a nonexempt cooperative is not excludible from its taxable income. The Court so holds * * *. [*Id.* at 1218–1219.]

In the *Union Equity* case, the court, after stating that "the *Des Moines* case is virtually on all fours with the instant case," and after approving the decision of the court in *Des Moines*, quoted with approval the following holding of the Tax Court in *Union Equity*:

> In attributing the entire dividend paid on capital stock to nonmember business, petitioner is saying, in effect, that its stockholders have invested only in those of petitioner's operations and assets which were used to transact nonmember business. * * * We are unable to find any indication that the stockholders here invested in anything but the undivided totality of petitioner's operations and assets. By following a computational path that fails to reflect the reality underlying its mode of operation, petitioner has substituted accounting fiction for taxable fact.
>
> "Consequently, in the absence of any evidence to the contrary, we uphold respondent's determination that the dividend paid on petitioner's capital stock was properly attributable to net earnings realized from member business and to net earnings realized from nonmember business in proportion to the business transacted with members and nonmembers respectively. Conversely, the amount of member earnings available for distribution as a true patronage dividend would have to be reduced by that part of the dividend on capital stock which was attributable to member earnings." [481 F. 2d at 815.]

Plaintiff relies heavily on *United States* v. *Mississippi Chemical Co.*, 326 F. 2d 569 (5th Cir. 1964). In that case the court upheld a corporate charter provision which required the payment of capital stock dividends out of earnings attributable to nonmember business. The courts in *Des Moines*

and *Union Equity* considered the *Mississippi Chemical* case and refused to follow it. The court in *Union Equity* and the Tax Court in that case distinguished the *Mississippi Chemical* case on the ground:

> * * * [T]here the trial court found as a fact that no part of the sum paid as a patronage dividend was paid, directly or indirectly, from the profits gained from business transacted with nonmembers * * *. [481 F. 2d at 815–16.]

On appeal the Fifth Circuit Court of Appeals held that this finding was "particularly correct." In this connection, we find that the appellate court in that case stated:

> * * * The record demonstrates, and the district judge concluded, that the cooperative actually paid the patronage refunds here from earnings on business done with the stockholder patrons. [326 F. 2d at 573.]

The court further stated:

> The District Court in the instant case was particularly correct in the following finding:
> * * * *That no part of said sum was paid from the profits on non-stockholder business.* * * * [*Id.* at 574.] [Emphasis supplied.]

From these findings in the *Mississippi Chemical* case, we conclude, as did the courts in *Des Moines* and *Union Equity*, that it is clearly distinguishable from those cases and from the case before us. Another distinguishing fact is shown by the decision in *Mississippi Chemical* when the court stated:

> * * * Treasury Regulations and Treasury Decisions, however, are not involved in the issue for decision here. * * * [326 F. 2d at 571.]

In contrast, Treasury Regulations and Decisions and the statute of 1962 (subchapter T) are very much involved in the instant case.

We conclude, as did the courts in *Des Moines* and *Union Equity*, that *Mississippi Chemical* is distinguishable from the case at bar and we cannot and do not follow it, because, among other reasons, the amounts which the plaintiff seeks to deduct here from its gross income as patronage dividends

were attributable at least in part to earnings from business done with *nonmember* patrons.

Plaintiff says that Section 1.1388–1(a) denies it equal protection of the law with respect to other corporations and in that respect, is discriminatory and unconstitutional. We do not agree. Plaintiff is not in the same class as ordinary corporations. As a nonexempt cooperative, the plaintiff receives benefits not given to ordinary corporations. As a cooperative, it enjoys the patronage dividend deduction in addition to deductions allowed to ordinary corporations. There is no discrimination between plaintiff and other cooperatives in the same class. We hold that the regulation does not deny plaintiff equal protection of the law, does not discriminate, is valid, and constitutional.

Finally, plaintiff contends that it is entitled to deduct a portion of the cash it paid to its member patrons because under Section 162 of the Code it was a deductible rebate. We do not agree. Plaintiff paid back to its member patrons all of the money it received from them. Any further distribution to members would have to be made out of earnings from sources other than from the members. Such a distribution is not a rebate and cannot be deducted under Section 162 of the Code.

We hold that the plaintiff, as a nonexempt cooperative, was required to deduct dividends paid on its capital stock ratably from all of its net earnings in computing the allowable patronage dividend deduction for federal income tax purposes during its fiscal years 1967 and 1968, and that the determination by the Commissioner of Internal Revenue of the income tax owed by the plaintiff during those years was correct.

CONCLUSION OF LAW

Upon the foregoing opinion, which includes therein the necessary facts that were stipulated by the parties, the court concludes as a matter of law that judgment should be and is hereby entered in favor of the defendant; that plaintiff's claim is denied; and plaintiff's petition is dismissed.

Syllabus

531 F. 2d 522

ITT FEDERAL SUPPORT SERVICES, INC. v. THE UNITED STATES

[No. 138–73. Decided March 17, 1976]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Contracts; cost-plus-fixed-fee contract; termination for convenience; pension plan contributions; entitlement to surplus moneys in pension fund.—Plaintiff entered into the subject cost-plus-fixed-fee contract in December 1965 and shortly thereafter it established a pension plan for its employees working on the contract. Plaintiff's contributions to the fund were reimbursed by the Government and the employees' share was carved out of funds handed over by the Government for employee wages. A trustee of the plan was appointed. In April 1971 plaintiff was notified of proposed contract termination for convenience. Although plaintiff transferred some support services and employees after reduction-in-force to another Government contractor, the fund and administration of the plan were not transferred until some time later after plaintiff purchased annuities to satisfy rights of terminated employees and following an agreement whereby plaintiff turned over to the successor contractor a sum to satisfy the rights of the transferred employees, the Atomic Energy Commission agreed to save and hold plaintiff harmless from and against all claims, etc. by transferred employees arising out of the transfer of funds, and the parties agreed that neither the fund transfer nor the agreement would prejudice the right of either party to the surplus remaining in the pension fund. In March 1973 the Government noticed plaintiff of its intent to recover by way of setoff the surplus in the pension fund, and plaintiff agreed to pay over to AEC the fund's balance. Thereafter this suit was filed claiming entitlement to surplus moneys in the pension fund as follows: (sum 1) post-contract-termination earnings and profits on the Government-reimbursed employer's share of the pension plan contributions, (sum 2) post- and pretermination earnings and profits on the employees' share of the contributions, and (sum 3) *quantum meruit* compensation for management of the pension fund after contract termination. Plaintiff seeks to recover sums 1 and 2, or 2 and 3, or 1, 2 or 3 alone. It is *held* that both the terms of the contract and equitable considerations mandate the Government's retention of sum 1 and denial of this aspect of plaintiff's claim. It is also *held* that under the terms of the contract plaintiff is not entitled to the earnings and profits accruing before and after termination on employees' contributions to the pension plan (sum 2). It is also *held* that there is no basis for an implied-in-fact contract covering *quantum meruit* compensation for plaintiff's post-termination

Syllabus

management of the pension fund (sum 3). Defendant's motion for summary judgment is granted, plaintiff's cross-motion is denied, and the petition is dismissed.

Contracts; cost principles; cost-plus-fixed-fee contract; pension plan contributions; post-termination earnings and profits on employer's share.

[1] A cost-plus-fixed-fee contractor is not entitled to post-contract termination earnings and profits on its share of pension plan contributions where the contributions and the costs of administering the fund were fully reimbursed by the Government, where both the contract and the parties considered the pension plan work to be incident to contract performance and they continued operation of the cost provisions through the post-termination period, and where the contract provided (a) that the contractor furnish the Government an assignment of its rights to any rebates or other credits applicable to allowable costs under the contract, (b) that the unexpended balance of any funds advanced by the Government and of any bank account (from which the contractor's contributions to the fund were paid) would remain in the Government, (c) that all revenues accruing to the contractor in connection with contract work be Government property, and (d) that the method by which the agency would recover any surplus monies which might accrue under the pension plan as a result of termination be in accordance with a separate agreement between the parties.

United States ⇐ 70(18)

Contracts; cost principles; cost-plus-fixed-fee contract; pension plan contributions; earnings and profits on employees' share.

[2] Where the subject contract provided that all revenues accruing to the contractor in connection with contract work be Government property and implicitly, that the agency was to recover any surplus in the pension fund, and the contract fails to limit the Government's share of the pension surplus to the proportion of reimbursed costs to total costs, the Government is entitled to all revenues accruing to the contractor and to any pension plan surplus, without regard to its source or cause.

United States ⇐ 70(18)

Contracts; implied contracts; implied in fact; basis for.

[3] Before a contract may be implied in fact, there must have been a meeting of the minds, inferable from the parties' conduct in light of the surrounding circumstances. Where the express contract provided for the Government's payment of the contractor's costs and an additionnal fixed fee for the latter's post-termination work on the pension plan and contemplated plaintiff's continued performance of the pension plan administrative services performed before termination, to be valid the implied contract would have to be entirely unrelated to the express contract and would have had to require the contractor to assume some duties different from those under the

formal agreement. The existence of an express contract precludes the existence of an implied contract dealing with the same subject.

United States ⇐ 69(2)

Contracts; implied contracts; implied in fact; basis for.

[4] Existence of an implied contract for additional pension plan administration compensation unrelated to the express contract is not demonstrated by the post-termination circumstance that the Government did not relieve the contractor immediately of the pension plan's administration, and by the contentions that the contractor had to assume the risks inherent in managing and investing pension plan funds, that it assumed the alleged risks with the Government's tacit approval, and that the Government must have known that the contractor would not manage the plan without expecting compensation, where the express contract provided for continued payment of costs and a fixed fee for the contractor's post-termination work on the pension plan which the Government paid, and the contractor has not shown that it assumed any new obligations and risks after contract termination.

United States ⇐ 69(2)

Gilbert A. Cuneo, attorney of record, for plaintiff. *Harvey G. Sherzer*, *Sellers*, *Conner & Cuneo* and *James V. McMahon*, of counsel.

Sheldon J. Wolfe, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DAVIS and KASHIWA, *Judges*.

DAVIS, *Judge*, delivered the opinion of the court:

This case, before us on the parties' cross-motions for summary judgment, is a tug of war between a government contractor and the Government over surplus moneys in a pension fund established for the cost-plus contractor's employees. Three sums are involved: (1) $821,572 in post-contract-termination earnings and profits on the government-reimbursed employer's share of the pension plan contributions (Sum 1); (2) $89,780 in post- and pre-termination earnings and profits on the employees' share of the pension plan contributions (Sum 2); and (3) an estimated $300,000 claimed by plaintiff as *quantum meruit* compensation for its management of the pension fund after the termination of the contract (Sum 3). Plaintiff seeks to recover Sums 1 and 2, or Sums 2

and 3, or Sum 1, 2, or 3 alone. The Government denies plaintiff's entitlement to any recovery.

Shortly after entering into a cost-plus-fixed-fee contract to provide support services for the Atomic Energy Commission and AEC contractors, plaintiff ITT Federal Support Services, Inc. (ITT/FSS) established a pension plan for employees working for plaintiff under the AEC contract. Irving Trust Company of New York became the trustee of the pension plan, funded by contributions from ITT/FSS and its employees. The Government reimbursed ITT/FSS for its $2,612,857 in contributions to the fund. The employees' share was carved out of the funds handed over by the Government for employee wages.

In April 1971 the AEC directed ITT/FSS to reduce its work force under the contract and then gave the contractor two months' notice of termination for convenience. By the end of August 1971 plaintiff had transferred some support services and the employees remaining after the reduction-in-force to another government contractor. However, the pension fund and administration of the pension plan were not then transferred—despite ITT's insistence on the immediate termination of all benefit plans—because ITT and the Government could not agree on the disposition of the pension benefits between the terminated and the transferred employees, and also because ITT wanted the AEC to obtain written confirmation of an informal Internal Revenue Service opinion about the closeout of the pension plan.

The formal IRS opinion was issued on May 2, 1972, and ITT/FSS and the AEC renewed discussion of the closeout of fringe benefits (including the pension plan) at about that time. Pursuant to an AEC authorization of May 25, ITT purchased, on August 29, annuities to satisfy the pension rights of its terminated employees. Negotiations on the disposition of the remaining pension assets continued and ultimately resulted in an agreement under which ITT/FSS turned over to the successor contractor, in care of the AEC, $1,607,346 to satisfy the rights of the transferred employees. This agreement of February 1973 declared that the AEC would save and hold ITT/FSS harmless from and against all claims, actions, and liabilities arising out of the transfer of funds

that might be asserted by any transferred employees, and that neither the fund transfer nor the agreement would prejudice the right of either party to the surplus remaining in the pension fund. As already indicated, a substantial surplus was left after the purchase of the annuities for the separated workers and the large transfer of pension funds to the successor employer.

In March 1973 the Government gave the two weeks' notice called for in the February agreement of its intent to recover—by way of set-off against other amounts due the ITT Corporation from the Government—the surplus in the pension fund. In response, ITT/FSS agreed to pay over to the AEC the fund's balance. This letter agreement, dated March 30, contained hold-harmless and reservation-of-rights clauses similar to those in the February agreement. This suit followed immediately.

Although ITT/FSS's pleading and briefs are broken into three counts and arguments, some themes and contentions run throughout the papers. Unravelling these common threads at the outset will simplify our subsequent disposition of plaintiff's specific claims to the three sums.

The major theme is the allegation that the post-termination management of the pension plan was not work under the contract or "as a result of employment under the contract." As a corollary, the plaintiff states that "the cost allowability provisions were no longer operative at the time the earnings and profits in question accrued. * * * Thus, plaintiff could not have recovered any fringe benefits *costs* in that time period * * *." Plaintiff's Motion for Summary Judgment at 21. These allegations reflect too narrow a view of work under the contract. This was, it must be remembered throughout, a fully reimbursable contract in which all appropriate costs were underwritten by the AEC. Prior to termination, the administration of the pension plan clearly was incident to the performance of the contract, which required plaintiff to furnish administrative services, authorized the establishment and maintenance of the pension plan, and treated the costs of the pension plan and other fringe benefit costs as allowable for reimbursement. The administration of the plan did not cease to be incident to the contract upon termination. On the contrary, the contract contemplated plaintiff's continued

administration of the plan after termination; as amplified by a letter of understanding, the contract declared post-termination fringe benefit costs incurred "as a result of employment under the contract" to be allowable costs and additionally provided for the payment of a fixed fee for plaintiff's post-termination closeout work on the plan. In actual practice, too, the parties expressly recognized that plaintiff's post-termination pension plan work was under the contract; ITT/FSS billed and the Government paid allowable costs and a fixed fee as called for by the contract for the period between termination and the plaintiff's transfer of the plan to the successor contractor.[1] Thus, both the contract and the parties considered the pension plan work to be incident to the performance of the contract and they continued the operation of the cost provisions through the post-termination time during which the earnings and profits at issue accrued. Despite its current legal arguments, plaintiff did in fact recover fringe benefit costs in that period.

In a connected theme, ITT/FSS says repeatedly that the AEC unilaterally delayed the transfer of the pension plan and the termination of plaintiff's administration of the plan. Affidavits submitted by the Government and not countered by the plaintiff ascribe the delay in pension plan closeout to disagreements between the parties over the disposition of the pension funds and to the time required to obtain the formal IRS ruling requested by ITT/FSS. These are not matters for which the Government can be held exclusively responsible; the AEC did not unilaterally delay the pension closeout. The result is that the entire span involved here came under the termination clauses and their provision that continued administration of the pension plan constituted work under the contract.

Plaintiff then contends that, in any event, post-termination losses on the pension plan assets would not have been reimbursable and therefore that after termination it had to assume all the risks inherent in managing the plan's assets. We cannot sustain this position either. Although the Government admitted in answer to plaintiff's interrogatories that

[1] The plaintiff has not denied its receipt of the fixed fee and reimbursement for certain post-termination costs associated with the pension plan.

the AEC has never reimbursed post-termination pension fund or similar losses, it also explained that no contractor has ever sought such reimbursement. Plaintiff can therefore draw no support from the AEC's prior practice. Further, since the allowable cost provisions, as applied to pension plan costs, remained in effect throughout the termination period, post-termination losses would have been treated in the same way as pre-termination losses—as reimbursable if they had met the requirements of the provisions governing allowable costs.[2] The key here is that we have no basis for differentiating the status of post-termination losses and risks from the status of pre-termination losses and risks. Such differentiation is crucial to plaintiff's claim that it was entitled to earnings and profits or to special compensation in the period after termination even though it was in no way entitled to either prior to termination.[3]

In the light of this discussion we now consider separately the plaintiff's claim to the three different sums outlined at the beginning of this opinion.

Sum 1—the post-termination earnings and profits on the employer's share. Plaintiff posits its claim to Sum 1 on the following syllogism: There can be no credits returnable to the Government where there could not have been an allowable cost; post-termination losses on the pension plan assets

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[2] Those provisions make losses meeting certain tests reimbursable unless explicitly excluded by other contract terms. The express exclusion to which plaintiff has pointed disallows "[l]osses * * * on, or arising from the sale, exchange, or abandonment of Contractor's capital assets, including investments; * * *." Losses on assets of the pension plan paid for with government money certainly are not the losses addressed by this clause which is concerned with the company's own private assets. The other loss-exclusion provisions are also inapplicable. Consequently, losses on these assets were reimbursable if they satisfied the restrictions of the clause defining allowable losses and the general allowable cost requirements.

It is on these requirements that losses on pension plan assets might have stumbled if they had occurred and been submitted as allowable costs. To be reimbursable, costs had to be actually incurred by the contractor and losses had to be sustained by it. Losses on the assets of the pension plan would not have affected plaintiff. The terms of the pension plan shielded ITT/FSS from liability for benefits; losses simply would have reduced the fund and the size of the share to which each employee was entitled. That being so, the disallowance of any losses merely would have reflected that the pension plan assets were not plaintiff's and that losses were not injurious to plaintiff. In short, ITT/FSS faced no risk. Plaintiff understandably does not address this basis for nonreimbursement of any potential losses.

[3] *See* note 4 and discussion of Sum 3 *infra*.

would not have been allowable costs; therefore, post-termination gains, the correlative of the losses, cannot constitute credits returnable to the Government. As we have already indicated, this reasoning is faulty. Plaintiff has neither proved, nor shown that it could prove, that losses on pension fund assets became unallowable costs upon termination of the contract.[4] Moreover, ITT/FSS's contributions to the pension fund and its costs of administering the fund were fully reimbursable (and reimbursed), so there were allowable costs to which the credits can be applied.[5] Most importantly, as we now show, the contract as a whole gives the Government the right to any surplus.

In addition to the pertinent provisions, pointed out above, which made it clear that administration of the pension fund in the post-termination period was reimbursable and compensable contract work, the contract contained several clauses which, taken together, strongly suggest that any surplus in the pension assets was to belong to the Government. One provision called upon the contractor, on termination of the work, to furnish

> an assignment of the Contractor's rights to any refunds, rebates, allowances, accounts receivable, or other credits applicable to allowable costs under the contract; [Art. VI, ¶ F.1.]

The employer's contributions to the pension fund were paid from a special bank account as to which the contract specifies:

> Title to the unexpended balance of any funds advanced and of any bank account established pursuant to this article shall remain in the Government * * *. It is understood that * * * the Contractor acquires no right, title, or interest in or to such advance other than the right to make expenditures therefrom as provided in this article. [Art. VI, ¶ D.]

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[4] Plaintiff has not claimed and could not claim entitlement to pre-termination earnings and profits on contributions reimbursed by the Government. Implicit in its argument that it is entitled to post-termination earnings on such contributions because post-termination losses would not have been reimbursed is the assumption that post-termination losses were different from pre-termination losses. As we have shown, post-termination losses would have received the same treatment as pre-termination losses.

[5] There are indications that the surplus resulted because the allowable costs, and therefore the Government's reimbursements, exceeded the amount necessary. *See* note 6 *infra*.

Even more significant are two provisions, the first a general one and the second directed expressly to the pension plan:

> All revenues other than the Contractor's fixed fee or fees, if any, accruing to the Contractor in connection with the work under this contract shall be Government property and shall be deposited in the Special Bank Account to be available for payment of allowable cost under this contract. [Art. VI, ¶I.]
> The method by which the Commission shall recover any surplus monies which may accrue under the [Pension] Plan as a result of employee turnover, contract expiration or termination or for any other reason shall be in accordance with the provisions of a separate agreement between the parties. [Appendix B, Art. V, ¶A. 4. b.]

In connection with the latter, any inability of the parties to agree on the method by which the Government is to recover the pension plan surplus does not negate the Government's basic contractual right (to the surplus) which underlies this clause.

An additional overriding factor favors the Government's retention of Sum 1. This amount represents earnings and profits on the $2,612,857 in employer contributions reimbursed by the Government. As in *Northrop Aircraft, Inc.* v. *United States*, 130 Ct. Cl. 626, 127 F. Supp. 597 (1955), "To hold in plaintiff's favor here would, consequently, result in the Government's furnishing plaintiff with money which the plaintiff in turn could reinvest solely for its own profit. This could hardly have been the intention of the contract." *Id.* at 630, 127 F. Supp. at 599. If ITT/FSS were right, it would acquire $821,572 without any investment of its own funds. It believes it deserves this increment because its management of the fund produced the surplus [6] and because that management was allegedly necessitated by the Government's unilateral

[6] There is some question as to what management activities plaintiff performed. The pension plan agreement stated that the management of the funds would be in the hands of the trustee or trustees appointed by ITT/FSS's Board of Directors. Shortly after the plan was established, the Irving Trust Company was named trustee, and it has been separately paid.

In addition, there is evidence that the surplus occurred solely because the contributions reimbursed by the Government and paid by the employees exceeded the necessary amount. According to plaintiff's own consultant, the surplus occurred due to erroneous actuarial calculations, calculations that were made by plaintiff. Thus, plaintiff seeks the benefit of its own errors, which caused the Government to incur extra expense under the cost-reimbursement phase of the contract.

delay in closing out the plan after termination. However, ITT/FSS could not "earn" the profits on another's money simply by performing management services; at the most, it could earn compensation for its work.[7] And as we have seen, the Government did not by itself delay the pension plan close-out; the plaintiff contributed to that lag.

In sum, both the terms of the contract and equitable considerations mandate the Government's retention of Sum 1 and the denial of this aspect of plaintiff's claim.

Sum 2—the earnings and profits on the employees' share. The contract provisions that undergird the Government's right to Sum 1 also lead us to uphold its retention of Sum 2. Those terms distinguish this case from those relied on by plaintiff, *RMK–BRJ*, 74–1 B.C.A. 49,892 (1974), and *California Institute of Technology*, 69–1 B.C.A. 35,404, *aff'd on reconsideration*, 69–2 B.C.A. 36,715 (1969), in which Boards of Contract Appeals awarded to the employers rather than the Government the portions of insurance premium refunds attributable to employee contributions. In *RMK–BRJ* the Armed Services Board of Contract Appeals denied the Government's claim to the entire refund because the government contract in that case contained this "language determinative of the appeal": "The Contractor agrees that any refunds * * * shall be paid by the Contractor to the Government, *to the extent that they are properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract.*" 74–1 B.C.A. at 49,895 (emphasis supplied by the Board). The contract in *California Institute of Technology* contained an identical provision (*see* 69–2 B.C.A. at 36,717 (opinion on reconsideration)); the NASA Board of Contract Appeals concluded that the Government was not entitled to the employees' share of the premium refunds because no contract term entitled the Government to that share and relevant regulations limited "applicable credits" to the share of premium refunds proportionate to the premium costs reimbursed by the Government. *See* 69–1 B.C.A. at 35,413, 35,411; 69–2 B.C.A. at 36,717.

[7] *See* discussion of Sum 3 *infra*.

Unlike the *Cal Tech* and *RMK–BRJ* contracts and regulations, the ITT/FSS agreement directly covers the Government's right to the sum at issue, and fails to limit the Government's share of the pension surplus to the proportion of reimbursed costs to total costs. Thus, the contract at bar entitles the Government, as between plaintiff and the AEC, to all revenues accruing to the contractor [8] and to any pension plan surplus, without regard to its source or cause.[9] Accordingly, we deny plaintiff's claim to Sum 2.

Sum 3—compensation quantum meruit for managing the pension fund post-termination. Plaintiff's third claim differs strikingly from its first two. Here, plaintiff claims entitlement to compensation, *quantum meruit*, for its post-termination management of the pension fund. This claim has some superficial appeal, but a clear understanding of plaintiff's request, against its background, necessarily leads to its rejection. Plaintiff is not asking to be reimbursed for its costs incurred or for the time spent by its employees in the administration of the plan. As plaintiff acknowledged in answers to the Government's interrogatories, the Government has already reimbursed costs and payments for the services of employees, consultants, and advisors; and the letter agreement of February 1973, which provided for the payment by the Government of allowable costs and a fixed fee for ITT/FSS's work through that month, settled all possible claims for reimbursement of

[8] An exhibit submitted by the plaintiff indicates that, in the plaintiff's view, the earnings and profits on funds contributed by its employees should be considered revenues accruing to it, the contractor, rather than to the employees. The exhibit, a letter from a consultant, states that the entire surplus resulted from erroneous actuarial calculations. By the terms of the pension plan agreement, the plaintiff had the right, as between it and its employees, to such a surplus.

[9] Although plaintiff's former employees might have some equitable claim to this sum, the earnings and profits on their contributions, we cannot consider that potential claim. The employees are not parties to this action, and we must decide between ITT/FSS and the Government. The terms of the contract impel us to choose the latter. From the standpoint of pure equity, neither of the present parties has a clear right to this sum, but a consideration related to the employees' possible rights, and the liability that will result if those rights are effectuated, gives the Government some equitable edge. In letter agreements, the Government has agreed to hold plaintiff harmless against claims by former employees, so the Government will bear any liability to the employees should they assert claims.

costs.[10] Plaintiff instead demands a "management fee" in the form of a cut of the pension plan profits.[11]

The contention is that an implied-in-fact agreement giving it the right to this *quantum meruit* recovery arose upon the termination of the formal contract and the failure of the Government to relieve plaintiff of the administration of the pension plan. There is, however, no basis for finding such an implied-in-fact contract which would support recovery. The express contract between ITT/FSS and the Government provided for the Government's payment of ITT's costs and an additional fixed fee for ITT's post-termination work on the pension plan, and contemplated plaintiff's continued performance of the pension plan administrative services performed before termination. To be entirely unrelated to the express contract,[12] the implied contract would at the least have to require ITT/FSS to assume some duties different from those under the formal agreement. Plaintiff has not shown the requisite meeting of the minds, inferrable from the parties' conduct, on such a separate contract. *Somali Development Bank* v. *United States*, 205 Ct. Cl. 741, 751, 508 F. 2d 817, 822 (1974); *Cities Service Gas Co.* v. *United States*, 205 Ct. Cl. 16, 23–24, 500 F. 2d 448, 451–52 (1974).

As the foundation for the implied agreement, plaintiff asserts that the Government knew plaintiff wished to be relieved of the plan's administration immediately after the

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[10] By contract requirement, plaintiff would have had to pursue any dispute over the amount received for costs and fixed fee through the contract disputes procedure.

[11] In its answers to the Government's interrogatories, plaintiff stated that the amount it received for post-termination costs and services in connection with the pension plan "does not include any profits or fees to plaintiff for services in connection with the risks taken and/or the successful management of the ITT/FSS Pension Plan," and explained that the $300,000 requested "represents approximately one-third of the surplus in the ITT/FSS Pension Plan Trust Fund. This is the amount which plaintiff believes and will prove that it was entitled to under currently prevailing business practices as its fee for assuming the risks inherent in and the successful management of the Pension Plan assets after the termination of the Operating Contract."

[12] The implied contract, if it is to be valid, must be entirely unrelated to the express contract. The existence of an express contract precludes the existence of an implied contract dealing with the same subject. *See, e.g., Klebe* v. *United States*, 263 U.S. 188, 192 (1923); *Algonac Mfg. Co.* v. *United States*, 192 Ct. Cl. 649, 673, 428 F. 2d 1241, 1255 (1970); *Swanson* v. *Levy*, 509 F. 2d 859, 861 (9th Cir. 1975), citing *Rogers* v. *American President Lines, Ltd.*, 291 F. 2d 740, 742 (9th Cir.), *cert. denied*, 368 U.S. 901 (1961).

termination; that the Government failed so to relieve ITT immediately, that ITT therefore had to "assume" all of the risks inherent in managing and investing the pension plan funds and did assume those with the Government's tacit approval, and that the Government must have known that it would not manage the plan without expecting compensation. These factors do not show the existence of an implied contract unrelated to the express contract. Of course the Government knew that the plaintiff would expect compensation for its continued administration of the plan, but the express contract provided for continued payment of costs and a fixed fee, and the Government paid those. Plaintiff has alleged nothing to show the Government's understanding that it would pay plaintiff additional compensation.

The lack of agreement on additional compensation might be irrelevant if the Government had foisted on plaintiff obligations and risks different from those under the express contract. An implied contract calling for plaintiff's acceptance of such duties and risks would carry with it an implied promise to pay reasonable compensation, and the Government would be liable for the compensation unless its prior payments satisfied the obligation. *See Cities Service Gas Co.* v. *United States*, 205 Ct. Cl 16, 24, 32, 500 F. 2d 448, 452, 456–57 (1974). However, plaintiff has not shown that it assumed any new obligations and risks after contract termination. In its own words, plaintiff *continued* to manage the pension plan assets. Plaintiff has not given us any reason to believe that its risks changed after termination.[13] It occupied the same position after termination as it occupied before, performing the work required by the express contract and receiving the compensation provided by that contract. There is no room for the implication of a contract giving plaintiff more. *See* note 12 *supra*. At best, plaintiff is impermissibly trying to squeeze into the mold of implied agreement its belated dissatisfaction with the provisions in the express contract for

[13] The only risk to which plaintiff has pointed is that unallowable losses would occur. The contract and the conduct of the parties show that the allowable cost provisions relevant to the pension plan remained in effect through completion of the plan's closeout, so the termination of the contract did not change the risk of loss. *See* note 2 *supra* and accompanying text.

Syllabus

compensation of and reimbursement for post-termination work on the pension plan.

The sum of it is that we find no basis for any recovery by the plaintiff. The Government's motion for summary judgment is granted, the plaintiff's motion is denied, and the petition is dismissed.

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531 F. 2d 529

SYSTEMS DEVELOPMENT CORPORATION v. THE UNITED STATES

[No. 164–75. Decided March 17, 1976]

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Contracts; interpretation; information retrieval system; licensed use; National Library of Medicine.—Under a contract entered into in June 1971 with plaintiff, the National Library of Medicine procured a computer system including a license to use the system in the retrieval of information from the Library's computer storage tapes containing medical and health data. Until 1975 the Library did not allow privately owned pharmaceutical houses, operated for profit, to avail themselves of the information retrieval facilities using the licensed system, but in January 1975 the facilities were opened to them. Plaintiff contends that the language of the license: "The National Library of Medicine agrees not to utilize licensed material in the performance of computer service bureau operations nor performance of any services for third parties except within its mission as established by law or regulation" restricts the use of the licensed system to noncommercial activities. It is *held* that the exception language modifies the entire sentence, i.e. the Library may perform "computer service bureau operations" if they are within its mission as set forth in 42 U.S.C. § 275, et seq. and implementing regulations; and that the services to pharmaceutical houses here involved are within the Library's mission. Defendant's motion for summary judgment is allowed and the petition is dismissed.

Contracts; interpretation; National Library of Medicine; purpose of Library.

[1] Where the National Library of Medicine provides to commercial pharmaceutical houses computer services here involved using the licensed system for retrieval of information from the Library's computer storage tapes, such services are within the Library's mission as established by 42 U.S.C. § 275 et seq. and implementing regulations to insure the most effective use by "health science professionals." Employees of the research arms of commercial pharmaceutical firms fall within the definition.

United States ⇐ 53(6)

Opinion of the Court

Contracts; interpretation; National Library of Medicine; "computer service bureau operations."

[2] If "computer service bureau operations" as used in the subject contract relates to a function performed by the National Library of Medicine within its mission before January 1975 for hospitals, universities, etc., it also relates to a function after said date performed for commercial pharmaceutical houses.

United States ⇐ 70(6)

Eldon H. Crowell, attorney of record for plaintiff. *Richard McMillan, Jr.*, *W. Scott Ferguson*, *Jones, Day, Reavis & Pogue*, *Bernard Fried*, and *Joseph D. Frascella*, of counsel.

Thomas J. Scott, Jr., with whom was *Assistant Attorney General Rex E. Lee*, for defendant. *Richard J. Riseberg*, and *William G. Ketterer*, of counsel.

Before DAVIS, NICHOLS and KASHIWA, *Judges*.

NICHOLS, *Judge*, delivered the opinion of the court.

This case is put before us by means of defendant's motion for summary judgment. There is no cross motion. Plaintiff (hereinafter SDC), a developer and marketer of computer programs ("computer software") furnished to the National Library of Medicine (NLM) a system known as ORBIT under a contract including a license to use that system with limitations. SDC says NLM has breached the limitations. NLM denies it. The issue mainly turns on a disputed interpretation of the limitation language. We see no issues of fact requiring trial. We hold for defendant and dismiss the petition.

NLM's library includes a mass of data called MEDLARS stored in computer tapes. ORBIT is not data itself, but an "information retrieval system" that enables the user to gain access to MEDLARS data. The contract was awarded in 1971. Since then, users outside NLM itself, hospitals, universities, etc., have been put "on line" and via commercial telecommunication facilities they can put questions to the MEDLARS tape and receive answers with the help of the ORBIT system. Until 1975, privately owned pharmaceutical houses, operated for profit, were not allowed to avail themselves of the same service because of a lack of computer

facilities in NLM. In January 1975, however, NLM, having more computers, made the same facilities available to these commercial houses. SDC says this is a breach of a license commitment by NLM not to operate a "computer service bureau", and takes away customers who would otherwise deal directly with SDC, to the damage of SDC in the amount of $4,124,472. Apparently, up to 1975 the pharmaceutical houses purchased services from plaintiff via their trade association. A second count alleges an uncompensated Fifth Amendment taking, but the motion does not deal with it separately. With either count, the problem is construction of contract language, asserted by each side to be clear in its favor, and actually, as murky as language can well be.

The disputed language reads:

> The National Library of Medicine agrees not to utilize licensed material in the performance of computer service bureau operations nor performance of any services for third parties except within its mission as established by law or regulation. (Punctuation as above; no commas).

SDC proposed this clause in its initial offer and NLM objected that it was too restrictive. It then lacked the words beginning with "except". NLM suggested adding these words, and this was done before signature. In this final form, the language is ambiguous in a very primitive way, in that, grammatically, the word "except" and what follows it may modify the whole sentence, or only "performance of any services for third parties". NLM urges the former, SDC the latter. The question may be stated as: May NLM perform "computer service bureau operations" if they are within its "mission", or not at all? The way the exception was added supports the idea that it modifies the whole sentence, but that is not the only reason for thinking so. Someone put brackets around the whole sentence in SDC's draft and wrote "delete?" in the margin. This appears in SDC's copy of its submission as attached to its opposition to the motion. It cannot but reflect NLM's initial reaction to the offer as noted by someone in SDC. It is obvious the exception was added as a substitute for deletion of the entire sentence as proposed at first.

The Library considers its mission to be stated in 42 U.S.C. § 275, *et seq.*, as implemented in regulations. While the Library is nominally for "the public" the Director is to limit the general public to the extent necessary to insure the most "effective use" by "health science professionals" defined in 42 C.F.R. § 4.3, as:

> * * * * * *
>
> (f) * * * any person engaged in the administration of health activities, the provision of health services, or in research, teaching or education concerned with the advancement of medicine or other sciences related to health or improvement of the public health.
>
> * * * * * *

Defendant's brief says, justly, that employees of the research arms of pharmaceutical firms fall within this definition. SDC, which had much other business with NLM, cannot but have known that the exclusion of such firms from "on line" access to MEDLARS was atypical, while it lasted since otherwise they enjoyed full use of the Library facilities, including its computer tapes. SDC's alternative argument that the practice adopted in January 1975, was outside the "mission" is too weak to consider further.

The parties invite our attention to the meaning of "computer service bureau operations". They seem to agree, pretty much, that it is the same as "performance of any service for third parties" except that it is always done for pay while the other may be gratuitous. The record includes one outside, impartial definition:

> *Service bureau.* An organization that leases or sells computer time, manpower, or other computational support to the public: Sondak. *The Layman's Dictionary of Computer Terminology.* Hawthorn Books, Inc., undated.

The record is somewhat obscure but apparently the NLM charges for the services here involved on an hourly basis, but below their real cost. Apparently profit and nonprofit institutions pay at the same rates. In explaining how this became "computer service bureau operations" in January 1975, and not before, SDC states lamely that the profit derived from their activities by the pharmaceutical houses is somehow imputed to NLM. The activity still utterly fails to

meet the definition. If NLM ever functioned as a "computer service bureau" it did so before January 1975, as much as after, yet SDC concedes as it must, there was nothing unlicensed in what NLM did for hospitals, universities, etc., before that date.

SDC's case thus fall flat on its face three times: it fails to show the "except" part of the license limitation does not except "computer service bureau operations" whatever they are, if within the NLM mission; it fails to show the services to pharmaceutical houses here involved are outside the mission, as conceived and publicized by the Library at the time the contract was awarded; and it fails to show that the services involved are "computer service bureau operations" if rendered to pharmaceutical houses, though not when rendered to hospitals and universities. If at the time of contract negotiations SDC had really adverted to the pharmaceutical houses, knowing as it must have that they were regular users of the Library's other services, and really intended to exclude them (though not, apparently, profitmaking hospitals of which there are plenty) they should have said or written something to make their intentions clear. The Library would naturally not expect a contractor to demand a stoppage of what it considered part of its normal mission, and one who did would be expected to make his intentions clear, at least. This plaintiff did not do. NLM introduced ORBIT into its computer system without any notice that it was thereby cutting off a class of its regular users.

Upon review of the briefs and record, but without oral argument, defendant's motion for summary judgment is allowed and the petition is dismissed.

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531 F. 2d 985

CURTIS L. STOREY v. THE UNITED STATES

[No. 292–74. Decided March 17, 1976]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Military pay; entitlement to disability retired pay; temporary disability retiree.—Plaintiff, while an Air Force serviceman, suffered injuries in a motor vehicle accident in November 1969 and was

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placed on the Temporary Disability Retirement List (TDRL). In 1973 after a physical reexamination required by 10 U.S.C. § 1210(a), a Physical Evaluation Board determined that plaintiff was physically fit for worldwide service and that his name should be removed from the TDRL. During the hearing, cross-examination of plaintiff revealed that he had been working at the United States Post Office while on the TDRL and that he was able to do the work required of him in such employment. The decision was affirmed by the Physical Review Council and the Secretary of the Air Force; and the Air Force Board for Correction of Military Records concluded that plaintiff had failed to establish a showing of probable error or injustice and denied him relief. Plaintiff's name was removed from the TDRL and he was discharged in September 1973. In the present suit, plaintiff, contending that he was not physically fit for duty, seeks replacement on the TDRL or permanent disability retirement, as well as the difference between the payments he would have received had he been continued in a retired status, and the payments he received from the Veterans Administration based on a disability rating of 40%. It is *held* that plaintiff has failed to sustain his burden of proving that the administrative decisions are arbitrary, capricious or unsupported by substantial evidence. Plaintiff's motion for summary judgment is denied, defendant's cross-motion is granted and the petition is dismissed.

Military pay; retired pay (disability); entitlement to disability retirement; temporary disability retiree; examining physican prognosis.

[1] Under Air Force Manual 35-4, Sec. 7-6d, disposition of a temporary disability retiree, such as whether he should be retired or discharged for disability, is a decision to be made by the Secretary of the service and not by the examining physician. The examining physician is confined to his medical findings and a statement that the serviceman was ineligible for worldwide duty is a gratuitous conclusion of law and beyond the scope of his duties.

Armed Services ⊂⊃ 22

Military pay; retired pay (disability); entitlement to disability retirement; Veterans Administration determination of disability.

[2] A disability rating by the Veterans Administration is not binding on the Air Force in determining retirement or separation of a serviceman for physical disability. The disability compensation of the Veterans Administration is provided by a different statute and for a different purpose than that provided for the Air Force.

Armed Services ⊂⊃ 22

Military pay; retired pay (disability); entitlement to disability retirement; incapacity (or fitness) for military service; burden of proof.

[3] In applying for correction of military records to show entitlement to disability retirement, the serviceman carries a heavy burden

to sustain his contention that the Correction Board's conclusion that he had failed to establish a showing of probable error or injustice in the decision of the Physical Evaluation Board finding him physically fit for worldwide service and removing his name from the Temporary Disability Retirement List, was arbitrary, capricious and unsupported by substantial evidence.

Armed Services ⇐ 22

Military pay; correction of military records; decision of Board or Secretary; finality of decision.

[4] The decision of the Secretary of the military service affirmed by the Board for Correction of Military Records concerning a serviceman's fitness for duty is entitled to finality and may not be overturned, even if the court might disagree with it, unless it is shown that such decision is arbitrary, capricious or unsupported by substantial evidence.

Armed Services ⇐ 22

Richard P. Fox, attorney of record for plaintiff. *Max Gest*, of counsel.

Gerald L. Schrader, with whom was *Assistant Attorney General Rex E. Lee*, for defendant. *Marc J. Fink*, of counsel.

Before SKELTON, NICHOLS and BENNETT, *Judges*.

SKELTON, *Judge*, delivered the opinion of the court:

The plaintiff, Curtis L. Storey, while a member of the United States Air Force suffered injuries to his left arm in a motor vehicle accident in November 1969, and, as a result thereof, was placed on the Temporary Disability Retirement List (TDRL) on January 4, 1972, in accordance with 10 U.S.C. § 1202 (1970). Anyone on this list is required by 10 U.S.C. § 1210(a) (1970) to be examined at least once every 18 months to determine whether there has been any change in his disability. In compliance with this requirement, the plaintiff was given a physical examination in May 1973, by Major Malcolm Heppenstall, who reported that the plaintiff "had made a remarkable recovery, with no evidence of infection of the upper left extremity," but stated further that he was "ineligible for worldwide duty."

Thereafter an informal Physical Evaluation Board (PEB) found that plaintiff's injuries were "not unfitting"

and recommended that he be removed from the TDRL. The plaintiff was not satisfied and asked for a review of this recommendation by a formal PEB. His request was granted and a hearing was held at Lackland Air Force Base on July 2, 1973. The plaintiff was represented by counsel at the hearing and was afforded every opportunity to present evidence in support of his contentions. Plaintiff was the only witness at the hearing. On cross-examination by members of the Board, it was revealed that plaintiff had been working at the U.S. Post Office while on the TDRL and that he was able to do the work required of him in such employment. Thereafter, the PEB determined that plaintiff was physically fit for worldwide service and that his name should be removed from the TDRL. This decision was affirmed by the Physical Review Council and the Secretary of the Air Force. The plaintiff's name was removed from the TDRL and he was discharged from the Air Force effective September 21, 1973. Plaintiff then petitioned the Air Force Board for the Correction of Military Records to grant him relief. Prior to rendering a decision, the Board asked for the opinion of the Surgeon General of the United States, who, on September 4, 1973, advised the Board by letter that "* * * the findings and recommendations of the PEB were reasonable and proper and no change in the record is warranted."

In the meantime, in January 1972, plaintiff filed a claim with the Veterans' Administration (VA), and after a medical examination in March 1972, the VA awarded him compensation of $96.00 per month from January 4, 1972, on the basis of a 40 percent disability rating. This was later increased to $106.00 per month based on the 40 percent disability rating.

After considering the report of Major Heppenstall, the decision of the PEB, the opinion of the Surgeon General, and the rating of disability given plaintiff by the VA, the Board concluded that the plaintiff had failed to establish "a showing of probable error or injustice," and denied any relief to him.

Thereafter, plaintiff filed suit in this court asking the court to replace his name on the TDRL or have him permanently

retired. He also seeks to recover, from the time his name was removed from the TDRL, the difference between the payments he would have received had he been continued in a retired status, and the payments he received from the VA. The case is before us on cross-motions for summary judgment.

The plaintiff relies heavily on the report of Major Heppenstall in which it was stated that plaintiff was "ineligible for worldwide duty." However, it appears that this was not a prognosis with reference to plaintiff's disability, but was a gratuitous conclusion of law that was contrary to Air Force Manual 35–4, sec. 7–6d which provides in part as follows:

> * * * *A statement of prognosis may be made, but reference to disposition of member, such as retirement or discharge for disability, or the probable percentage of disability will not be included in clinical records, summaries or abstracts.* [Emphasis in original.]

It is clear from this provision that the physician is confined to his medical findings, but the disposition of the serviceman is a decision to be made by the Secretary and not by the examining physician. Consequently, Major Heppenstall's conclusion as to the disposition to be made of plaintiff is of no help to him.

Plaintiff also relies heavily on the disability rating given him by the VA. However, it is well-established that a VA disability rating is not binding on the Air Force. *Bennett* v. *United States*, 200 Ct. Cl. 635 (1973); *Unterberg* v. *United States*, 188 Ct. Cl. 994, 412 F. 2d 1341 (1969); *Williams* v. *United States*, 186 Ct. Cl. 611, 405 F. 2d 890, *cert. denied*, 396 U.S. 966 (1969). The disability compensation of the VA is provided by a different statute (38 U.S.C. § 331 *et seq.*) and for a different purpose than that provided for the Air Force (10 U.S.C. § 1201 *et seq.*). The VA rating of plaintiff was considered by the Correction Board, but it did not bind the Board nor control its decision.

The plaintiff contends that the decision of the Correction Board is arbitrary, capricious, and unsupported by substantial evidence. Plaintiff carries a heavy burden in sustaining this position. *Callan* v. *United States*, 196 Ct. Cl. 392, 450 F. 2d 1121 (1971); *Unterberg* v. *United States*, *supra; Cooper* v. *United States*, 203 Ct. Cl. 300 (1973).

The decision of the Secretary which was affirmed by the Correction Board, is entitled to finality and may not be overturned, even if the court might disagree with it, unless it is shown that it is arbitrary, capricious, or unsupported by substantial evidence. *Williams* v. *United States*, *supra*. We conclude that the plaintiff has failed to make such a showing in this case, and, accordingly, the decision of the Correction Board is final and is affirmed. *Unterberg* v. *United States*, *supra*.

Plaintiff's motion for summary judgment is denied and that of defendant is granted and plaintiff's petition is dismissed.

BENNETT, *Judge*, concurring:

I join fully in Judge Skelton's opinion, but deem it advisable to add a word with respect to an alternative position taken by plaintiff in this case. Plaintiff's moving brief pressed upon us the argument that his removal from the TDRL and consequent discharge violated an applicable regulation, DOD Directive 1332.18, as it existed at the time here in question. Paragraph V.B. of that directive enumerates certain presumptions which uniformly are to be indulged by officials in applying federal laws, relating to separation from military service by reason of physical disability. Thus, in the absence of a preponderance of evidence to the contrary (1) a member is presumed to have been physically fit upon entry into the service; (2) any disease or injury discovered after entry into the service is presumed incurred in the line of duty; (3) in the case of disease or injury known to have existed before entry, aggravation is presumed to have been service-connected; and, finally (4) certain "acute infections" will be presumed service-incurred or service-aggravated. Paragraph V.B.2 goes on to provide that whenever there exists a reasonable doubt concerning the member's condition, the facts will be resolved on the basis of the foregoing presumptions in favor of the member.

Plaintiff derives from this language the conclusion that since the PEB was confronted with a reasonable doubt as to whether he was *fit for worldwide service*, the doubt necessarily under the directive had to be resolved in his favor and

a finding made that he was not fit. As I see it, plaintiff's error rests with the undue breadth with which he reads paragraph V.B.2 of DOD Directive 1332.18. He says, in effect, whenever there is a reasonable doubt *as to anything* touching his physical condition, such doubt must be resolved in his favor. I do not agree. The language upon which plaintiff relies has no significance apart from the limited presumptions listed above, which are set out immediately preceding the words to which plaintiff refers us. The directive merely says that in the absence of a preponderance of the evidence rebutting these presumptions, findings must be made in accordance with the facts presumed. Therefore, in my opinion, the portions of DOD Directive 1332.18 cited by plaintiff have no application in this case, and his discharge cannot be voided under the doctrine of *Service* v. *Dulles*, 354 U.S. 363 (1957).

I agree that the petition should be dismissed.

NICHOLS, *Judge*, concurs in both Judge Skelton's opinion and Judge Bennett's concurring opinion.

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531 F. 2d 531

WILLIAM T. SODE v. THE UNITED STATES

[No 492–73. Decided March 17, 1976]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Military pay; disability retired pay; dual compensation restriction.—Plaintiff, presently a Federal civilian employee, was formerly an officer in the United States Coast Guard. From November 1967 to November 1968 he served with the Coast Guard Merchant Marine Detail in Saigon, Viet Nam, investigating civilian seamen disciplinary problems on United States merchant ships; his duties included trips to Vietnamese ports, often through hostile territory and under enemy fire, to conduct investigations. While in Viet Nam plaintiff developed non-specific meningitis and returned to the United States on December 30, 1968, undergoing surgery in a U.S. Public Health Service hospital from which he was released in February 1969; he returned in October 1969 for further surgery. A Physical Evaluation Board evaluated plaintiff's condition as 90% combined disability rating, and on January 18, 1970 plaintiff was

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retired for physical disability. On January 25, 1970 plaintiff commenced work as a Hearing Examiner with the Social Security Administration. Following denial by the Coast Guard Board for Correction of Military Records of correction of his records to indicate retirement by reason of disability resulting from injury or disease received in line of duty as a direct result of armed conflict pursuant to 5 U.S.C. § 5532(c)(1)(A), plaintiff filed this suit seeking full retirement pay without reduction from January 19, 1970 to date of judgment and an order correcting his records to reflect such judgment. It is *held* that an interpretation of the subject statute requires plaintiff to show a direct causal relationship between armed conflict and the disabling injury or disease received in line of duty. The medical evidence did not attribute plaintiff's contraction of the disease to direct armed conflict but rather diagnosed the disability as of unknown origin. Plaintiff's motion for summary judgment is denied, defendant's cross-motion is granted, and the petition is dismissed.

Statutes; construction and operation; legislative intent; dual compensation restriction.

[1] In interpreting the purpose of Congress in enacting the retirement pay reduction exemption of 5 U.S.C. § 5532(c)(1)(A), this court follows well-recognized principles of statutory analysis, i.e. the ordinary and commonly understood meaning will be attributed to the terms employed in the statute unless a contrary meaning is clearly intended, and an unambiguous statute should be given effect according to its plain and obvious meaning.

Armed Services ⇐ 23.1(6)

Statutes; construction and operation; legislative intent; legislative history; generally.

[2] As a statute cannot be divorced from the circumstances existing at the time of its passage, the legislative history of a statute provides a certain degree of insight into the congressional motivation behind a statute.

Statutes ⇐ 215

Statutes; construction and operation; administrative interpretation.

[3] The construction given to any law or regulation by the administrative agency charged by statute with carrying it out is entitled to great weight by the courts and ought not be overruled without very compelling reasons.

Statutes ⇐ 219(1)

Administrative Law and Procedure ⇐ 413

Statutes; construction and operation; absurdity.

[4] Statutes must not be construed to produce absurd and whimsical results unrelated to congressional purpose.

Statutes ⇐ 212.3

Military pay; dual compensation restriction; exemption from restriction; combat disability retirement.

[5] The retirement pay reduction exemption to the Dual Compensation Act, provided in 5 U.S.C. § 5532(c)(1)(A) applies to those disabled service retirees who received their disability as a *direct result* of armed conflict. In ordinary terms, for a condition to be the direct result of an event, the event must be the direct cause of the condition. Hence, under the statutory language of the exemption, if the disability must be the direct result of armed conflict, the armed conflict must be the direct cause of the disability.

Armed Services ⇐ 23.1(6)

Military pay; dual compensation restriction; exemption from restriction; combat disability retirement.

[6] Absent indication to the contrary, it was not the intent of Congress that the substitution in the 1964 amendment to 5 U.S.C. § 5532(c)(1)(A) of "armed conflict" for "combat" abrogated the causality requirement between the military activity (armed conflict or combat) and the disability. The legislative history of the 1964 amendment clearly indicates that Congress intended merely to simplify and consolidate the various existing employment laws and did not intend to extend the applicability of the exemption to cover the incurrence of a disease or disability in a general combat area which was not the direct result of armed conflict.

Armed Services ⇐ 23.1(6)

John I. Heise, attorney of record, for plaintiff. *S. Giles Payne*, of counsel.

Kenneth J. Ingram, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before DURFEE, *Senior Judge*, NICHOLS and KASHIWA, *Judges*.

DURFEE, *Senior Judge*, delivered the opinion of the court:

In this case of first impression, a former uniformed military service officer, presently a Federal civilian employee, retired from the service because of medical disability, argues that the 1964 amendments to the Dual Compensation Act [1] provide an exemption to the retirement pay reduction pro-

[1] 5 U.S.C. § 5531, *et seq.* (1970).

visions of that Act [2] for an officer medically retired because of contraction of a disabling disease in an armed conflict zone and that the Coast Guard Board for Correction of Military Records (BCMR) erred in holding to the contrary. On thorough consideration of the issue, the BCMR's decision denying plaintiff's exemption claim is sustained.

Plaintiff commenced active service in the United States Coast Guard in January 1950 as an Ensign rank officer. From November 1967 to November 1968, plaintiff, then a Coast Guard Commander, served as a Coast Guard Shipping Advisor with the Military Sea Transport Service, Far East, as a Merchant Marine Detail Officer attached to the Coast Guard Merchant Marine Detail stationed in Saigon, Republic of Viet Nam, an acknowledged armed conflict zone. As a Merchant Marine Detail officer in Viet Nam, plaintiff's duties were to investigate civilian seamen disciplinary problems on United States' merchant ships delivering supplies to Viet Nam. This duty included excursions to outlying Vietnamese ports, often through hostile territory and under enemy fire, to board incoming American flag merchant ships, inspect the vessels' records and investigate reported incidents of crew misconduct.

While in Viet Nam, plaintiff developed physical disabilities affecting his eyesight, equilibrum and internal bodily functions. Plaintiff's maladies were eventually diagnosed as nonspecific meningitis, and he received treatment in service hospitals in Viet Nam and the United States. Plaintiff returned from Viet Nam on December 30, 1968 and immediately entered the United States Public Health Service Hospital in Seattle, Washington. While in the hospital, plaintiff underwent surgery for correction of the complained of disabilities. Following his release from the hospital in February 1969, plaintiff's condition showed some improvement. However, in October 1969 plain-

[2] By an Act of August 19, 1964, Pub. L. 88-448, 78 Stat. 484, Congress amended the retirement pay reduction exemption contained in the prior Economy Act of June 30, 1932, 74 Stat. 382, 406, as amended 54 Stat. 760, 761 to its present language. By an Act of September 6, 1966, Pub. L. 89-554, 80 Stat. 378, 482, Congress revised the form, but not the language, of the retirement pay reduction exemption to that presently appearing in 5 U.S.C. § 5532(c) (1970).

tiff was again admitted to the Seattle Public Health Service Hospital for a second corrective operation. During this hospital stay, a Central Physical Evaluation Board evaluated plaintiff's condition as a 90 percent combined disability rating.[3] The Physical Review Counsel approved the Board's disability evaluation on December 12, 1969 and the Coast Guard Commandant approved the same on January 5, 1970. On January 18, 1970, plaintiff was permanently retired from the service by reason of physical disability.

It is undisputed that plaintiff's medical records evidenced no prior history of the disabilities which resulted in plaintiff's retirement from the service and that the disabilities had their onset during plaintiff's service in Viet Nam.

In a January 15, 1970 letter to the Coast Guard Commandant, plaintiff requested that his medical disability retirement be found to be caused by wounds, disease or injury incurred while serving in a combat zone. The Coast Guard Commandant responded to plaintiff's request on March 10, 1970, advising plaintiff that, if he felt his retirement had been improperly categorized, he should seek appropriate relief from BCMR.

On January 25, 1970, plaintiff accepted a position as a Hearing Examiner (now Administrative Law Judge) with the Social Security Administration, Bureau of Hearings and Appeals, Division of Field Operations, with the San Francisco Regional Office, Seattle Duty Station. In this position, plaintiff became subject to the retirement pay reduction provisions of the Dual Compensation Act.[4]

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[3] Plaintiff's disabilities were rated by a Central Physical Evaluation Board as follows:

1. Brain, new growth of, benign, minimum rating with impairment and weakness of gait—60%.
2. Skull, loss of both inner and outer tables following surgery. Area larger than 2 square inches—50%.
3. Muscle function, eyes, impairment of—30%.

Plaintiff received a 90% combined rating of his disabilities.

[4] The retirement pay reduction provisions of the Dual Compensation Act, 5 U.S.C. § 5532(b), specify:

"(b) A retired officer of a regular component of a uniformed service who holds a [Federal civilian office or] position is entitled to receive the full pay of the position, but during the period for which he receives pay, his retired or retirement pay shall be reduced to an annual rate equal to the first $2,000 of the retired or retirement pay plus one-half of the remainder, if any. In the operation of the formula for the reduction of retired or retirement pay under this subsection, the amount of $2,000 shall be increased, from time to time, by

On May 19, 1970, plaintiff, through counsel, wrote the Chief Medical Officer of the Coast Guard requesting information on the necessary procedural steps to qualify for an exemption to the retirement pay reduction provisions of the Dual Compensation Act. Subsequently, on January 25, 1971, plaintiff applied to the BCMR requesting correction of his records to "indicate retirement by reason of disability resulting from injury or disease received in line of duty as a direct result of armed conflict pursuant to Title 5, U.S. Code, Section 5532(c)."

Plaintiff requested the above record correction to avail himself of the reduction in retirement pay exemption to the Dual Compensation Act (5 U.S.C. § 5532(c)). That exemption provides in pertinent part:

> (c) The reduction in retired or retirement pay required by subsection (b) of this section does not apply to a retired officer of a regular component of a uniformed service—
>
> (1) whose retirement was based on disability—
>
> (A) resulting from injury or disease received in line of duty as a direct result of armed conflict; or
>
> (B) caused by an instrumentality of war and incurred in line of duty during a period of war as defined by sections 101 and 301 of title 38;
>
> * * *.

After thorough consideration of the case, the BCMR, in a detailed opinion, approved by the Secretary of Transportation's designee, denied plaintiff's record correction:

> We [the BCMR] have seriously considered the contentions advanced by the petitioner; however, we are unable to agree. It is our opinion, based on the medical findings and evaluations of record, that his disability cannot be characterized as an injury or disease received in line of duty as a direct result of the armed conflict in Viet Nam; nor can it be said that his disability was caused by an instrumentality of war while in line of duty. We do not agree with the argument advanced by the petitioner that, the amendment of the Economy Act substituted the words "armed conflict" for the word "combat", in order

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appropriate percentage, in direct proportion to each increase in retired or retirement pay under section 1401a(b) of title 10 to reflect changes in the Consumer Price Index."

to broaden the class of persons entitled to exemption from retirement pay reduction. In our opinion, the substitution was made merely to enlarge the area of hostilities where a serviceman might become engaged in combat with the enemy. While one may well conclude that petitioner was in the area of armed conflict while in Viet Nam, there has been no showing that he received an injury which caused his disability nor has the petitioner shown to our satisfaction that his disability should be characterized as a disease incurred or contracted as the direct result of armed conflict.

In their respective summary judgment motions, neither party disputes the above summarized facts. Rather, the parties take opposite stands as to the legal conclusions to be drawn from those facts. Plaintiff contends that they adequately establish his entitlement to an exemption from the Dual Compensation Act. Defendant argues for the reverse contention that they preclude plaintiff's entitlement to an exemption. Thus, the issue to be decided is whether the retirement pay reduction exemption contained in 5 U.S.C. § 5532 (c) (1) (A), set forth above,[5] is, as plaintiff contends, available to a qualified individual on a showing that he contracted a disease in an armed conflict zone which resulted in his disability retirement or rather, as defendant argues and the BCMR held, available to a qualified individual on a showing that he contracted a disease as a direct result of armed conflict which resulted in his disability retirement. The court concludes that the latter proposition must prevail.

In interpreting the retirement pay reduction exemption provided by 5 U.S.C. § 5532(c) (1) (A) "* * * our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort." *62 Cases of Jam* v. *United States*, 340 U.S. 593, 596 (1951). Helpful in solving this problem are several recognized principles of statutory analysis calculated to expose the correct interpretation of a disputed statute. Prominent among these principles are the established analytical guides "that the ordinary and commonly understood meaning be

[5] Plaintiff bases his exemption claim only on 5 U.S.C. § 5532(c) (1) (A) and acknowledges the exemption provided by 5 U.S.C. § 5532(c) (1) (B) is not at issue herein.

attributed to the terms employed in the statute unless a contrary meaning is clearly intended." *Benton* v. *United States*, 203 Ct. Cl. 263, 269, 488 F. 2d 1017, 1020 (1973), and "that an unambiguous statute should be given effect according to its plain and obvious meaning." *Prudential Ins. Co.* v. *United States*, 162 Ct. Cl. 55, 65, 319 F. 2d 161, 166 (1963). Besides the above noted fundamental principles of statutory analysis resort to secondary guideposts serve to elucidate the intended purpose and meaning of a statute. As a statute cannot be divorced from the circumstances existing at the time of its passage, the legislative history of a statute provides a certain degree of insight into the Congressional motivation behind a statute. *Akins* v. *United States*, 194 Ct. Cl. 477, 483, 439 F. 2d 175, 177 (1971). In *McLean* v. *United States*, 226 U.S. 374 (1912), the Supreme Court approved this court's examination of Congressional reports to ascertain the Congressional intent behind a particular statute. Another well established aid to statutory meaning and intent is the rule "* * * that the construction given to any law or regulation by the administrative agency charged by statute with carrying it out, is entitled to great weight by the courts and ought not be overruled without very compelling reasons. * * *". *Kantor* v. *United States*, 205 Ct. Cl. 1, 7 (1974).

In addition to the preceding affirmative principles of statutory analysis, there exists the helpful negative analytical precept that "* * * [s]tatutes, like regulations, must not be construed to produce absurd and whimsical results unrelated to congressional purpose * * *." *Steuer* v. *United States*, 207 Ct. Cl. 282, 294 (1975).

Application of the aforementioned principles to the problem of the retirement pay reduction exemption to the Dual Compensation Act, provided in 5 U.S.C. § 5532(c)(1)(A), compels the conclusion that the exemption applies, as defendant contends, to those disabled service retirees who received their disability as a direct result of armed conflict.

The most compelling reason behind the above conclusion is the statute itself. The statute does not want for clarity of expression, but rather proclaims clearly that to qualify for the exemption the disability must be received as a direct

result of armed conflict. *In ordinary terms, for a condition to be the direct result of an event, the event must be the direct cause of the condition.* Hence, under the statutory language of the exemption, if the disability must be the direct result of armed conflict, the armed conflict must be the direct cause of the disability.

Plaintiff's repeated argument that the statute applies to persons contracting a disabling disease as a direct result of their country's involvement in armed conflict, distorts the plain causality requirement contained in the statute. Under plaintiff's analysis, to activate the exemption a disability need only result from a country's involvement in armed conflict rather than the armed conflict itself. This argument cannot prevail against the plain wording of the statute which specifies that the disability must be received as a *direct result* of armed conflict.

The present statutory exemption to the retirement pay reduction provisions to the Dual Compensation Act under which plaintiff claims is an amended version of a similar exemption contained in the Economy Act of June 30, 1932, 47 Stat. 382, as amended 54 Stat. 760, 5 U.S.C. 59a. The amended 1932 Act contained the following exemption:

> (b) This section shall not apply to any person whose retired pay, plus civilian pay, amounts to less than $3,000: *Provided*, That this section shall not apply to regular or emergency commissioned officers *retired for disability incurred in combat with an enemy of the United States* or for disabilities resulting from an explosion of an instrumentality of war in line of duty during an enlistment or employment as provided in Veterans Regulation Number 1(a), part I, paragraph I. [Italics supplied.]

In *Kennedy* v. *United States*, 162 Ct. Cl. 752 (1963), the court interpreted this exemption as requiring a party claiming entitlement to the exemption, to show a "direct causal relationship between the combat and the disability". *Kennedy* v. *United States*, *supra*, 162 Ct. Cl. at 757.

Plaintiff contends that the *Kennedy* decision is inapplicable to the present case because of the 1964 amendments to the exemption which substituted the requirement that the disability result "from injury or disease received in

line of duty as a direct result of armed conflict" for the requirement that the disability be "incurred in combat with an enemy of the United States." While the *Kennedy* case is factually distinguishable from this case in some respects, the causation standard laid down in the 1963 *Kennedy* decision remains intact. Plaintiff advances no acceptable argument that 1964 substitution of "armed conflict" for "combat" in the exemption abrogated the causality requirement between the military activity (armed conflict or combat) and the disability.

The legislative history behind the 1964 amendment to the exemption statute both supports the continued vitality of the causality requirement and refutes plaintiff's argument that the amended version of the exemption expanded its coverage to those disabled just while serving in an armed conflict zone.

The Senate Report on the bill containing the 1964 exemption amendments appears in 2 U.S. CODE CONG. AND ADM. NEWS, 2834 (1964). That report notes in its opening paragraph that the amending bill was proposed "* * * to simplify, modernize, and consolidate the laws * * * concerning civilian employment of retired members of the uniformed services * * *." 2 U.S. CODE CONG. AND ADM. NEWS, 2834 (1964). The report states as one of the basic purposes of the proposed legislation which contained the exemption amendments:

> (1) At the present time, legislation and administrative decisions in regard to dual compensation and dual employment are varied and complex. There are approximately 50 separate statutes and 200 Comptroller General decisions relating to the employment of retired military personnel and the dual employment of civilian officers. Few administrators or personnel officers in Federal agencies fully understand the present law, and cannot be present in every case when an important decision or interpretation applicable to a particular situation is made. *Thus by merely simplifying and consolidating all these laws and regulations into one manageable statute, a major accomplishment will be achieved.* * * *. 2 U.S. CODE CONG. AND ADM. NEWS, 2835 (1964) [Emphasis added].

None of the four stated purposes of the legislation which eventually amended the retirement pay reduction exemp-

tion proposed to change, broaden or modify the prevailing law regarding the compensation of disability retired service personnel employed in Federal service. Rather the report states that "[r]etired Reserve officers, enlisted men and Regular officers retired for combat disability are not now restricted by dual employment laws. [The proposed legislation] does not affect these retired military persons insofar as their retirement pay or civilian pay is concerned. It does, however, give their fellow service member, the Regular officer retired upon the completion of his career, a more equitable employment opportunity". 2 U.S. CODE CONG. AND ADM. NEWS, 2835–36 (1964).

The views of the Executive Branch in support of the exemption amending legislation, contained in the Senate Report without opposition, note that:

> The proposed law would continue the principle of treating separately those retired military personnel whose retirement was based on disability resulting from an injury or disease received in line of duty as a direct result of armed conflict, or caused by an instrumentality of war and incurred in line of duty during a period of war. 2 U.S. CODE CONG. AND ADM. NEWS, 2849 (1964).

The Chairman of the Civil Service Commission, by letter reprinted in the Senate Report in favor of the amending legislation, explained the limited purpose behind the proposed amendment to the reduction in retirement pay exemption:

> (1) [A prior exemption amending bill] contained an exemption from the bill's provisions for retired military members whose retirement was based on disability "incurred in combat with an enemy of the United States." This exemption has been changed in the current proposal to include those retired members whose disability results "from an injury or disease received in line of duty as a direct result of armed conflict." This change would extend the exemption to those disabled in the kind of cold war conflicts in which American military personnel are now engaged. 2 U.S. CODE CONG. AND ADM. NEWS, 2845 (1964).

A review of the legislative history of the 1964 Act amending the retirement pay reduction exemption clearly indicates that Congress in amending the exemption to its present form

intended merely to simplify and consolidate the various existing employment laws and did not intend to extend the applicability of the above exemption to the manner plaintiff presently advocates.

The Comptroller General, after a review of the legislative history, reached the same conclusion:

> There is nothing in the legislative history of the Dual Compensation Act of 1964 to suggest that Congress intended that the change in phraseology from "in combat with an enemy of the United States" to "as a direct result of armed conflict" should change the basic requirement that the disability should directly result from armed conflict. It seems doubtful that Congress intended that the mere incurring of a disease in a general area where combat operations might occur should in itself be regarded as "a direct result" of armed conflict. In other words, we think that the law contemplates that an officer is within the exemption only if the disability for which retired is "a direct result of armed conflict" in which the retired officer himself was personally engaged rather than merely incurred in the general area in which the United States is involved in an armed conflict. * * *. 48 Comp. Gen. 219, 222–23 (1968).

Lastly, plaintiff's position that any injury or disease that service personnel receive while serving in an armed conflict zone which results in their disability retirement falls within the retirement pay reduction exemption cannot be sustained. One can imagine an almost unlimited number of injuries or diseases, both exotic and ordinary, which members of the armed services could receive by their mere presence in an armed conflict zone without any relation to the actual ongoing armed conflict. To accept plaintiff's interpretation of the retirement pay reduction exemption would unquestionably violate the rule that statutes not be interpreted to produce absurd or whimsical results. *Steuer* v. *United States*, *supra*.

While for the above stated reasons, plaintiff cannot prevail in this case, his effort has provided the court with the appropriate vehicle to update its prior *Kennedy* decision to meet the changing needs of the time as reflected in Congress' enactment of 5 U.S.C. § 5532(c)(1)(A). To prevail on an entitlement claim to a 5 U.S.C. § 5532(c)(1)(A) exemption a plaintiff now must show a direct causal relationship between armed

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conflict and the disabling injury or disease received in line of duty.

Resolving the interpretation of 5 U.S.C. § 5532(c)(1)(A) as requiring a direct causal relationship between the armed conflict and the disability disposes of plaintiff's claim as the undisputed medical evidence before the BCMR regarding plaintiff's disability did not specifically attribute plaintiff's contraction of non-specific meningitis to direct armed conflict. Rather the medical opinion before the BCMR repeatedly diagnosed plaintiff's disability as of unknown origin.

Accordingly, plaintiff's summary judgment motion is denied, and his petition dismissed. Defendant's cross-motion for summary judgment is granted.

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530 F. 2d 1387

DANIEL S. URBINA v. THE UNITED STATES

[No. 443–74. Decided March 17, 1976]

ON DEFENDANT'S AND PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

Civilian pay; reassignment; special salary rate; cancellation of reassignment; re-reassignment at reduced pay; dismissal; absent without leave; counterclaim.—On October 17, 1971 absent 30-days' advance notice, plaintiff was reassigned from his GS–12 position to a similar position with a different organizational unit at the same grade and at the same special higher salary rate, although Civil Service Commission regulations require termination of the special salary rate at the time of reassignment. On July 18, 1973 the agency issued a notice cancelling the reassignment and restoring plaintiff to his former position; and at the same time it reassigned him again at reduced pay using the adverse action procedure including the 30-day advance notice required for effecting a reduction in pay. On Friday, September 7, 1973, plaintiff requested and was granted sick leave for the following Monday, September 10, but he did not return to work and made no attempt to communicate with the agency to request additional sick leave until after he was contacted by the agency 10 days later. Although aware that he was being carried as absent without leave he did not report for work, and after an absence of 50 days he was served with a notice of proposed removal with stated reasons. Plaintiff replied to the notice and on December 6 the agency issued a notice of removal for un-

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authorized absence effective December 14. Plaintiff's appeal of his reduction in pay and removal was denied by the Civil Service Commission after a hearing, the Regional Office and the Board of Appeals and Review sustaining the action. Plaintiff seeks back pay at the higher rate from the date of his removal to date of judgment herein, and claims that he was unfairly treated in the reassignment action. It is *held* that there has been substantial compliance with statutory and regulatory requirements; that the decisions of the Government officials were neither arbitrary nor capricious; and that there was substantial evidence supporting their decisions relating to plaintiff. It is also *held* that the cancellation of the first reassignment and restoration of plaintiff to his former position, although for only a short period of time before his re-reassigning and reduction in pay, nullify defendant's counterclaim for the excess moneys paid plaintiff after his first reassignment. Defendant's motion for summary judgment is granted, plaintiff's cross-motion is denied, and the petition is dismissed.

Civilian pay; reassignments; procedural violation.

[1] Where plaintiff was reassigned from his position to a similar position with a different organizational unit in the same grade and at the same special higher salary rate which he had been receiving, since regulations require termination of the special salary rate at time of reassignment and since a reduction in pay is an adverse action and plaintiff did not receive the 30-days' advance notice of the transfer, the reassignment was accomplished in violation of regulations and was ineffective and invalid.

Officers ⇐ 11.7

Civilian pay; Court of Claims jurisdiction; administrative or executive decision; review of by court.

[2] This court's review of administrative actions is limited to determinations of whether there has been substantial compliance with statutory and implementing regulatory requirements, whether there has been any arbitrary or capricious action on the part of Government officials, and whether there was substantial evidence for the decision.

Administrative Law and Procedure ⇐ 751, 763, 791

Civilian pay; reassignments; discretion of employing agency.

[3] Agencies have wide discretion in effecting reassignments of their personnel.

United States ⇐ 36

Civilian pay; reassignment; reduction in compensation; arbitrary and capricious action; what constitutes.

[4] Where the agency sought to correct its error when it reassigned plaintiff to a similar position in the same grade without terminating his special higher salary rate as regulations required by cancelling the original reassignment, restoring plaintiff to his former position

and then reassigning him again at reduced pay using the adverse action procedure including the proper 30-day advance notice required for effecting a reduction in pay, the decision of the Civil Service Commission Regional Office was neither arbitrary nor capricious and was supported by substantial evidence in finding that the reduction in pay was mandated by law and accomplished by the agency in recognition of plaintiff's right to protection of the adverse action procedure.

Officers ⇐ 11.7

Civilian pay; dismissal; absent without leave.

[5] Where plaintiff did not report for duty after his approved one day sick leave, made no attempt to communicate with the agency to request additional sick leave until after he was contacted by the agency 10 days later, was thereafter aware that he was being carried as absent without leave, and at the time notice of proposed removal was delivered to him he had been absent without leave for 50 days, and where in support of his absence he contended that he was entitled to such leave, based upon his own judgment, without regard to management's authority and responsibility to grant or approve sick leave, such unilateral actions by an employee cannot be tolerated, and the decision to remove plaintiff was neither arbitrary nor capricious and was supported by substantial evidence.

Officers ⇐ 69.7

Counterclaims; civilian pay; saved-rate position; reassignment; excessive pay on reassignment.

[6] Where the agency reassigned plaintiff to a similar position at the same grade without terminating his special higher salary rate as regulations require, the subsequent cancellation of the reassignment and restoration of plaintiff to his position and salary, although he was shortly thereafter reassigned at a reduced rate of pay, operate to nullify defendant's counterclaim to recover the excessive pay plaintiff received after his first reassignment.

United States ⇐ 39(14)

Gilbert D. Lopez appearing for *pro se* plaintiff.

Raymond B. Benzinger with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before SKELTON, NICHOLS, and BENNETT, *Judges*.

SKELTON, *Judge*, delivered the opinion of the court:

This case marks the second appearance before this court of Daniel S. Urbina. In the first *Urbina* case, it was held that

the plaintiff had been illegally separated from his position with the Department of the Air Force (180 Ct. Cl. 194 (1967)). Plaintiff's motion for summary judgment was granted, with the amount of recovery due to lost wages to be subsequently determined. Such determination was made in which plaintiff recovered a total of $48,267.11 as back salary, resulting from plaintiff's having been off the payroll from October 16, 1961, through May 14, 1967 (192 Ct. Cl. 875, 428 F. 2d 1280 (1970)). Now, plaintiff seeks lost salary due to a second removal from his job, which is unrelated to the first discharge. Plaintiff's petition does not request reinstatement to his former position. After considering the pleadings, the briefs, and argument, we grant defendant's motion for summary judgment and deny plaintiff's cross-motion for summary judgment.

Plaintiff complains of two adverse actions taken against him by his employer, the Department of the Air Force. The first action terminated plaintiff's saved-rate of pay status when on October 17, 1971, plaintiff was reassigned from Mechanical Engineer, GS–12, to a similar position in the same grade in a different organizational unit at the 15th Civil Engineering Squadron at Hickam Air Force Base, Hawaii. Plaintiff was being paid at a special, higher rate in the former job. Although Civil Service Commission regulations require termination of the employee's special salary rate at the time of reassignment, such action was not taken and his pay was not reduced. It is undisputed that when plaintiff was first transferred on October 17, 1971, adverse action procedures were not observed. Plaintiff did not receive 30 days' advance notice of the transfer, which was required by 5 C.F.R. § 752.202 (1971), since there was also supposed to be a reduction in pay. A reduction in pay is an adverse action. The reassignment was effective in all respects except that it did not effectively reduce plaintiff's pay as of October 17, 1971. Since personnel actions accomplished in violation of regulations are void under *Service* v. *Dulles*, 354 U.S. 363 (1957), plaintiff's first reassignment on October 17, 1971, was ineffective and invalid. Some two years later, on July 18, 1973, the agency issued a notice of reinstatement restoring

plaintiff to his former position, canceling the October 17, 1971, reassignment, and at the same time reassigning him again and informing plaintiff that his compensation would be thereafter reduced. By letter of August 15, 1973, defendant notified plaintiff that his saved-rate salary of $22,187 would be discontinued and reduced to $21,686, effective August 19, 1973. (The excessive pay received by plaintiff after his first reassignment is the subject of a counterclaim by defendant, to be discussed below.) Plaintiff claims that he was unfairly treated in this reassignment action and contests the reassignment and reduction in pay.

Secondly, in his main contention, plaintiff complains about his subsequent removal described below. The facts show that plaintiff requested and was granted sick leave on Friday, September 7, 1973, for the following Monday, September 10. He did not return to work on September 11th, and in fact never returned to work at all. He made no effort to explain his absence from his job until September 20, 1973, when an employee of the agency contacted him by telephone at his residence. In the ensuing conversation, plaintiff told the employee that he thought he had been granted an "indefinite" sick leave to have his broken eyeglasses repaired. The first time that plaintiff contacted the agency was on September 24 when he stated by telephone that he still did not have his eyeglasses. On October 14, plaintiff mailed a letter to the agency stating that he got his repaired eyeglasses on October 3, but that he was still unable to work because of an injured leg. He enclosed a letter from Dr. William Gulledge with respect to his examination of plaintiff's leg on September 28, which plaintiff submitted as evidence of his incapacity. However, Dr. Gulledge testified at the hearing before the Civil Service Commission, as related in the CSC opinion:

> * * * Dr. Gulledge testified that on September 28, Mr. Urbina was not physically unable to return to work after the visit and that his (Dr. Gulledge's) records indicated he could "continue * * * light work" as of September 28, although appellant had possession of a form report of the visit showing the patient's work status as "off" under the block designated "date patient may return to work."

On October 19, 1973, while plaintiff was still absent from work without leave, the agency issued a notice of proposed removal to him of that date proposing to remove him from his job, stating specifically and in detail the reasons for the proposed action, including "your unauthorized absence since 11 Sep. 73 and your disregard to instructions for requested leave." This notice was delivered to plaintiff's residence on October 30, 1973, as he was still absent from work and the notice could not be delivered to him in person on the job. On that date, plaintiff had been AWOL for 50 days.

Plaintiff requested an extension of time to reply to the charge, and he was granted such extension until November 19, 1973. He submitted written replies dated November 9 and 19, 1973, in which he claimed that leave had been approved in advance on September 10, 1973, so he could obtain eyeglasses, and that he had been incapacitated for work. On December 6, 1973, the agency issued its notice of removal, effective December 14, 1973, on which date plaintiff had been AWOL for 94 days. The plaintiff appealed both the removal and reduction of pay to the CSC, which, after a hearing, sustained both actions. The plaintiff then appealed to the Appeals and Review Board, which also sustained both actions. Thereafter, plaintiff filed this suit for back pay at the higher rate from the date of his removal to the present time.

This court has specifically delineated its authority to review administrative actions. Such review is normally to determine (1) whether there has been substantial compliance with statutory and implementing regulatory requirements; (2) whether there has been any arbitrary or capricious action on the part of the government officials; and (3) whether there was substantial evidence for the decision. *Peters* v. *United States*, 187 Ct. Cl. 63, 408 F. 2d 719 (1969); *Harrington* v. *United States*, 174 Ct. Cl. 1110 (1966); *Powers* v. *United States*, 169 Ct. Cl. 626 (1965); *Greenway* v. *United States*, 163 Ct. Cl. 72 (1963).

As to plaintiff's reassignments, such actions were not reductions in grade, and no reduction in force occurred. Agencies have wide discretion in effecting reassignments of their personnel. *Comberiate* v. *United States*, 203 Ct. Cl. 285, 288

(1973); *Urbina* v. *United States*, 192 Ct. Cl. 875, 880–81, 428 F. 2d 1280, 1283–84 (1970); *Burton* v. *United States*, 186 Ct. Cl. 172, 180, 404 F. 2d 365, 369–70 (1968), *cert. denied*, 394 U.S. 1002 (1969). A reduction in force necessarily includes the release from government service of competing employees. 5 U.S.C. § 3502 (1970). There has been no allegation or proof of competition for positions due to reductions in force at any stage in this controversy. Certainly there was substantial compliance with statutory and regulatory requirements on this point. The decision of the regional office of the CSC on plaintiff's reduction in compensation claim relates that the relevant facts surrounding the controversy are not contested. The decision correctly finds that the reduction was mandated by law and that the proper procedures were followed by the agency. The decision also notes that because no other similar position was available, plaintiff was not entitled to assignment to another saved-rate position. The decision was neither arbitrary nor capricious and was supported by substantial evidence.

The decision to remove Mr. Urbina was likewise neither arbitrary nor capricious, and was supported by substantial evidence. Plaintiff has never denied his long absence from work, but rather has relied on his contention that he was entitled to such leave, based upon his own judgment, without regard to management's authority and responsibility to grant or approve sick leave. Plaintiff was not a new employee, but had been in government service for 20 years. It can be assumed that after serving 20 years as a Government employee, the plaintiff had knowledge of the rules governing sick leave. In any event, it is obvious that if all employees of the Government could decide when and how long they could have sick leave without any advance approval by proper officials of the hundreds of agencies and departments by whom they are employed, we would have chaos in our Government. Such unilateral action by an employee cannot be tolerated. The following statement of the Appeals Review Board is significant:

> With respect to the merits of the removal action, the Board concurs in the Region's finding that the appel-

lant's September 10, 1973 request for sick leave was for one day only; and that the appellant made no attempt to contact the agency to request additional sick leave until after he was first contacted by the agency on September 20, 1973. It is evident from the record that the appellant was aware of the fact that he was being carried as AWOL following his conversation with agency personnel on September 20, 1973. In view of the fact that the agency never approved the appellant's absence beginning on September 11, 1973; that the reason for his absence from September 11 through October 3, 1973 was within his control and that he could have returned to work in a light duty status on October 4, 1973, the Board finds that the reasons for the appellant's removal are supported by the substantial evidence of record. The Board further finds that the appellant's removal based upon the two sustained charges was warranted and for such cause as will promote the efficiency of the service.

The Government has filed a counterclaim for the excess salary paid to plaintiff after he was first reassigned from the saved-rate position and his salary was not reduced at the same time. We hold that the Government is not entitled to recover on such counterclaim. Plaintiff was paid at the higher rate for almost two years, and, finally such reassignment was cancelled and he was restored to his former position and salary, although for only a short period of time before he was again reassigned at the reduced salary. We conclude that such cancellation and restoration nullified the claim that the Government asserts in its counterclaim.

For all the reasons set forth above, it is clear that the Government was completely justified in terminating plaintiff's special pay rate and in removing him from his job. We hold that there has been substantial compliance with statutory and regulatory requirements; that the decisions of the Government officials were neither arbitrary nor capricious; and that there was substantial evidence supporting their decisions relating to Mr. Urbina. Accordingly, we grant defendant's motion for summary judgment and deny plaintiff's cross-motion for summary judgment and dismiss plaintiff's petition. Defendant's counterclaim is denied.

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531 F. 2d 538

JET CONSTRUCTION COMPANY, INC. v. THE UNITED STATES

[No. 402-74. Decided March 17, 1976]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Contracts; disputes; specifications; performance in compliance with specifications.—Plaintiff entered into a fixed-price contract with General Services Administration to furnish and install air conditioning and lighting in an existing building in Trenton, New Jersey. Plaintiff subcontracted the air conditioning work to another on whose behalf it brings this suit from denial by the contract appeals board of its claim for additional compensation which plaintiff alleges was occasioned by the Government's rejection of a certain manufacturer's units which plaintiff contemplated using because they failed to comply with contract requirements. Following rejection of plaintiff's proposed units, defendant exercised its contractually reserved power and instructed plaintiff to install either of two other named units which plaintiff did under protest. On review of the record before the board, it is *held* that the board's finding that plaintiff failed to propose a unit meeting contract specifications is supported by substantial evidence, that the board's legal determination that defendant properly exercised its contractual power in directing plaintiff to furnish and install one of two different manufacturer's units is correct, and that all of plaintiff's objections to the board's decision are either factually unsupported and/or legally meritless. Plaintiff is not entitled to recover, its motion for summary judgment is denied, defendant's cross-motion is granted, and the petition is dismissed.

Contracts; disputes; administrative decision; burden of proving error in.

[1] In a Wunderlich Act review case, plaintiff has the burden to specify the facts and circumstances contained in the record before the contract appeals board which make the board's decision lacking in substantial evidence. General declaration of protest and unsupported assertions of error do not demonstrate actual board error. It is not the function of the court to supply deficiencies in proof by an independent excursion along the administrative trail.

United States ⇐ 73(15)

Contracts; disputes; administrative decision; substantial evidence; what constitutes.

[2] The administrative determination that the subject contract specifications were not restricted to a sole-source item as opposed to plaintiff's unsupported assertion that the unit was proprietary

in nature, is based on substantial evidence where the record shows that the contract appeals board considered the testimony of defendant's contract specifications draftsman denying that the specifications were so restrictive, that defendant directed plaintiff to install one of two different manufacturer's units, and that three different manufacturers produced units capable of meeting the contract specifications.

United States ⇐ 73(14)

Contracts; specifications; right of Government to compliance with. [3] The fact that contract specifications, reasonably possible, complete and competitive, call for a unique or specialty item rather than a shelf item imposes no duty on the Government to affirmatively disclose the novelty of the item to the contractor nor is the latter entitled to additional compensation for any difficulty or unanticipated expense incurred in meeting the contract specifications.

United States ⇐ 70(21)

Contracts; specifications; right of Government to compliance with. [4] In undertaking a contract, the contractor promises to perform according to the contract specifications, and the Government has the right to insist on contractor performance in compliance with them.

United States ⇐ 73(1)

Eugene Drexler, attorney of record, for plaintiff.

Donnie Hoover, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, and KUNZIG, *Judge*.

DURFEE, *Senior Judge*, delivered the opinion of the court:

In this contract suit plaintiff seeks Wunderlich Act (41 U.S.C. §§ 321, 322 (1970)) review of a decision of the General Services Administration Board of Contract Appeals (Board) denying its claim for additional compensation on a building renovation contract between plaintiff and the General Services Administration (GSA). The parties' respective motions for summary judgment brings the case before this court without challenge to the bulk of the underlying facts. As neither party contests the majority of the Board's factual determinations, as stated in its opinion, they will be restated here only in abbreviated form. A fuller factual picture appears in the Board's reported decision, *Jet*

Construction Co., Inc., GSBCA No. 3348, 74–1 BCA ¶10,560, affirmed on reconsideration, 74–1 BCA ¶10,641. The Board decisions are affirmed for the reasons stated below.

In March 1970, plaintiff contracted with the GSA on a firm-fixed price basis to furnish and install air conditioning and lighting in an existing Government building in Trenton, New Jersey. Plaintiff subcontracted the air conditioning part of its contract to Hudik-Ross, Inc., on whose behalf it brings this appeal. The air conditioning part of plaintiff's contract called for the supply and installation of wall mounted packaged terminal air conditioning and heating units meeting specific contract requirements. The contract stated detailed mechanical, installation, performance and other specifications required of the units to be supplied under the contract without any designation as to a particular brand name or manufacturer. To insure that the supplied units complied with the stated contract specifications, defendant as part of the contract provisions, required plaintiff to submit a list of proposed materials for approval.

The parties' contract provided:

> 21–03. Approval of Material
>
> a. Within 60 days after the receipt of notice to proceed, the contractor shall submit to the Architect a complete list, hereinafter called the "Materials List," showing for each item in Material Schedule set forth below the name of the manufacturer of the product that he proposes to use in the project. Consideration will not be given to partial lists submitted from time to time. The Architect will forward the above list with his recommendations to the Contracting Officer for final action.

Failing the contractor's compliance with the above contract provision, defendant reserved the right to select materials for use in the renovation work at no additional cost to the Government:

> 21–03. * * *
>
> h. Should the Contractor fail to comply with any of the requirements of the preceding subparagraphs, i.e.:
> 1. Fail to submit the "Material List" in accordance with the above schedule to the Architect or the Public Buildings Service for approval within 60 days after the date of receipt of notice to proceed;

2. Fail to name items in accordance with Specification requirements and of the best quality and grade;
then the right is reserved by the Public Buildings Service to select any or all items in the above Material Schedule, which selection shall be final and binding upon the Contractor. The materials selected or approved, as the case may be, by the Public Buildings Service shall be used in the work at no additional cost to the Government.

Plaintiff received its notice to proceed on April 15, 1970 and on April 27, 1970, submitted data on 'Climate Master' air conditioning units manufactured by Cool-Heat Corp. for approval. Defendant disapproved these units on May 5, 1970 because they failed to comply with the mechanical, installation, performance and other requirements of the contract. On June 3, 1970, plaintiff again submitted the Cool-Heat Corp. 'Climate Master' units for defendant's approval and again on June 12, 1970 they were disapproved because, as defendant advised the contractor in a June 26, 1970 letter, of the number of unresolved deviations from plans and specifications. On June 30, 1970, defendant learned that plaintiff again intended to resubmit the twice-disapproved Cool-Heat Corp. 'Climate Master' units and on that date advised plaintiff by telegram that this was unacceptable and directed plaintiff, under its contract Para. 21–03h reserved power, cited above, to furnish and install Remington or Nesbitt brand air conditioning units. Plaintiff furnished and installed the Remington units under protest and pursued this claim for the additional cost of those units over plaintiff's proposed and thrice-rejected Cool-Heat units.

After the Contracting Officer's denial of plaintiff's claim, the Board, on timely appeal, found that plaintiff's submitted units did not conform to the contract specifications; that defendant properly and neither arbitrarily nor capriciously exercised its contractual rights under contract para. 21–03h; and that defendant's contract specifications did not restrict plaintiff to a sole source for the units. Plaintiff moved for reconsideration of this latter Board finding which, on reconsideration, the Board affirmed. 74–1 BCA ¶ 10,641.

Plaintiff's four-page petition and five-page brief in support of its summary judgment motion in this case amounts to no more than a general declaration of protest and does not

rise to the pointed specification of Board error required of a party seeking to overturn a Board decision. In a Wunderlich Act review case the "* * * plaintiff has the burden to specify the facts and circumstances contained in the Board's record which make the Board's decision lacking in substantial evidence. *Volentine & Littleton* v. *United States*, 136 Ct. Cl. 638, 643, 145 F. Supp. 952, 954 (1956); *River Constr. Corp* v. *United States*, 159 Ct. Cl. 254, 269 (1962). * * *". *Jefferson Constr. Co.* v. *United States*, 177 Ct. Cl. 581, 589, 368 F. 2d 247, 252 (1966). Plaintiff, in this case, has done little more than place the Board record before the court, and challenged the court to find error in the record rather than properly taking up the challenge itself of establishing factual or legal error in the Board's decision. "* * * It is not the court's function to supply this deficiency by an independent excursion along the administrative trail. * * *". *Sundstrand Turbo* v. *United States*, 182 Ct. Cl. 31, 60, 389 F. 2d 406, 423 (1968).

More deadening to plaintiff's claim than its own failure to specifically demonstrate Board error is defendant's mustering of evidence from the Board record augmented with authoritatively supported legal arguments in defendant's brief in support of the Board decision. Defendant's effort convincingly demonstrates the error-free validity of the Board's decision to which plaintiff elected not to respond.

In its petition, plaintiff succinctly asserts its contentions of error in the Board's decision:

> 5. Plaintiff contends that the Board erred in denying the Appeal when it failed to find: (i) that Plaintiff offered a product which *in effect* met the requirements of the Specifications; (ii) that Plaintiff was improperly subjected to pre-qualification testing; (iii) that the specifications as *administered by* Defendant resulted in a proprietary or sole-source air-conditioning unit; and (iv) that since the specifications gave no indication that the air-conditioning units were experimental or developmental nor did it list suggested sources it thereby so prejudiced Plaintiff in establishing a bid price that it gave rise to a compensable claim.

Some of these contentions, forthrightly stated in plaintiff's petition, appear in its narrative brief attacking the Board's

decision submerged in somewhat less readily identifiable form. Matching the error contentions in plaintiff's petition with the corresponding supportive arguments supplied in its brief, forces the conclusion that plaintiff has demonstratively failed to show Wunderlich Act error in the Board's decision and requires affirmance of the decision.

Plaintiff restates its first petition contention that its offered units in effect met the requirements of the contract in paragraph-3 of its brief attacking the Board for failing to consider that plaintiff did offer a unit that equaled the contract specifications. Plaintiff does not point out what record evidence supports this assertion. Nor does plaintiff explain why the Board's affirmative finding that plaintiff's units did not conform to the contract specifications, 74–1 BCA ¶10,560, p. 50,020, is unsupported by substantial evidence.

In reaching its decision the Board had before it the direct testimony of a GSA Supervisory Mechanical Engineer, with over forty years' experience, that plaintiff's proposed units did not meet or equal either the contract specifications or standard of quality. Additionally, before the Board were two letters from defendant's private professional Architect/Engineer to plaintiff, detailing numerous deficiences between plaintiff's proposed units and the specification requirements, both of which specifically concluded that plaintiff's proposed units did not meet the contract specifications.

This evidence, unrefuted, unrebutted and unexplained by plaintiff amply supports the Board's finding that plaintiff's proposed units did not meet the contract specifications and clearly negates plaintiff's mere assertion to the contrary. *River Constr. Corp.* v. *United States*, 159 Ct. Cl. 254 (1962).

In its brief, plaintiff makes no argument and cites no authority in support of its second petition contention. Nor does plaintiff explain how or why, even accepting its contention, it is entitled to recovery thereon. Plaintiff, having elected to abandon this argument, the court does likewise, perceiving it to be inherently meritless.

As plaintiff's third petition contention of Board error, it asserts that the Board failed to find that defendant administered the contract specifications to effectively limit plain-

tiff's choice of air conditioning suppliers to Remington alone. This assertion is reiterated in paragraph –4 of plaintiff's brief as "Plaintiff further proved that the manner in which Defendant administered the procurement created *in effect* a sole source locked-in item to Remington. * * *."

Plaintiff, in its brief, cites to no record evidence to support this assertion. Moreover, its assertion that the Board failed to find that defendant's administration of the contract specifications resulted in sole source locked-in procurement to a Remington manufactured unit stands in stark contrast to the Board's affirmative finding on this issue. The Board, in its original decision, considered the testimony of the Government's contract specifications drafstman denying that the specifications were restrictive to a Remington manufactured unit alone, and the fact that in exercising its material selection power under contract para. 21–03h, cited above, defendant directed plaintiff to use equipment supplied by one of two different manufacturers capable of meeting the contract specifications. On this evidence the Board specifically concluded: "* * * We therefore find that the specifications did not restrict [plaintiff] to a sole source for the units." 74–1 BCA ¶ 10,560, p. 50,019. On reconsideration of this issue the Board affirmed its earlier conclusion, holding: "* * * In short, [plaintiff] failed to show that the units specified by the Government were proprietary in nature and in this posture this case cannot be considered within the ambit of the *Elrich* case." 74–1 BCA ¶ 10,641, p. 50,523. Plaintiff does not directly attack either of these findings or their underlying evidentiary basis. Rather, it merely asserts, without citation to any record evidence, that it proved to the contrary. As noted above, general declarations of protest and unsupported assertions of error do not demonstrate actual Board error. *River Constr. Corp.* v. *United States*, *supra; Jefferson Constr. Co.* v. *United States*, *supra; Sundstrand Turbo* v. *United States*, *supra.*

The Board's reliance on the testimony of the contract's specification draftsman, defendant's telegram that directed plaintiff to install one of two different manufacturer's units plus the Board's finding that three different manufacturers produced units capable of meeting the contract specifications,

substantially supports the Board's finding that the contract specifications were not restricted to a single manufacturer's units, and persuasively refutes plaintiff's unadorned assertion to the contrary.

Plaintiff urges reliance on *Elrich Constr. Co.*, GSBCA No. 3657, 73-2 BCA ¶ 10,187, as providing a legal basis for recovery in this case. Unsuccessful with this argument before the Board, plaintiff, without any factual or legal analysis of the applicability of the *Elrich* decision to the instant case or discussion as to the alleged Board error in rejecting plaintiff's *Elrich* argument, again merely asserts the applicability of that Board decision as a basis for recovery. In *Elrich*, the Board granted relief to a contractor because the contract specifications, unknown to either party, called for supply of a patented item obtainable from only one source. The Board findings in the present case, substantially supported by the record evidence, demonstrate that the specified units were not the proprietary product of a single manufacturer, and were available from three different suppliers.

The marked factual differences between the *Elrich* case and the instant case support the Board's legal determination as to the inapplicability of the former case to the present one, and vitiates plaintiff's *Elrich* argument as a basis for recovery herein.

Plaintiff's last petition contention appears in a reconstituted form in paragraph -1 of its brief, and essentially asserts that defendant's failure to advise plaintiff that the contract specified units were unique items rather than standard shelf items, as plaintiff admits it assumed, gives rise to a compensable claim.

The fact that contract specifications, clear, reasonable possible, complete and competitive call for a unique or specialty item rather than a shelf item imposes no duty on defendant to either affirmatively disclose the novelty of the item or entitles plaintiff to additional compensation for any difficulty or unanticipated expense incurred in meeting the contract specifications. *Industrial Engineering Co.* v. *United States*, 92 Ct. Cl. 54 (1940); *Rolin* v. *United States*, 142 Ct. Cl. 73, 160 F. Supp. 264 (1958); *Remler Co.* v. *United States*, 179 Ct. Cl. 459, *cert. denied*, 389 U.S. 840 (1967); *WRB Corp.* v.

United States, 183 Ct. Cl. 409 (1968). In undertaking a contract, the contractor promises to perform according to the contract specifications, and the Government has the right to insist on contractor performance in compliance with them. *Farwell Co.* v. *United States*, 137 Ct. Cl. 832, 148 F. Supp. 947 (1957); *H.L.C. & Associates Constr. Co.* v. *United States*, 176 Ct. Cl. 285, 367 F. 2d 586 (1966); *Maxwell Dynamometer Co.* v. *United States*, 181 Ct. Cl. 607, 386 F. 2d 855 (1967); *S.S. Silberblatt, Inc.* v. *United States*, 193 Ct. Cl. 269, 433 F. 2d 1314 (1970).

Plaintiff's above contention lacks both factual foundation and legal support, and fails to state recognizable Board error.

In the final analysis, the Board's finding that plaintiff failed to propose a unit meeting the contract specifications, is sustained as supported by substantial evidence. Likewise, the Board's legal determination that defendant properly exercised its contractual power, under para. 21–03h, in directing plaintiff to furnish and install one of two different manufacturer's units is affirmed. On review of the Board record, the court concludes that all of plaintiff's objections to the Board's decision are either factually unsupported and/or legally meritless, and that plaintiff is not entitled to recovery in this action.

Defendant's cross-motion for summary judgment is granted. Plaintiff's summary judgment motion is denied, and its petition dismissed.

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531 F. 2d 988

PUNTY BOGART AND PETER D. BOGART v. THE UNITED STATES

[No. 16–75. Decided March 17, 1976]

ON DEFENDANT'S MOTION TO DISMISS AND PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Deed of trust agreement; third-party beneficiary; title to property sold at delinquent tax sale; collateral estoppel.—In the latter part of 1965 plaintiffs acquired at a delinquent tax sale certain real property located in Nevada. The Lathrops, owners of the property, had previously executed and delivered a deed of trust to Pioneer Title Insurance Co. to secure a note owed to the United States as

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mortgagee of the property. The deed of trust required the Lathrops to pay all taxes, insurance, etc. and also provided that Pioneer reconvey the property upon payment of the note. In August 1970 the Lathrops paid their debt to the United States and the latter directed Pioneer to reconvey the property to them which was done. In 1974 the Lathrops filed suit in a Nevada state district court against plaintiffs to set aside as void the tax sale on the ground that no notice had been mailed or delivered to the Lathrops of assessment of delinquent taxes, etc. The court held the tax sale void for lack of said notice and the Supreme Court of Nevada affirmed the lower court's judgment. In this suit plaintiffs seek damages and an order directing the United States to vacate and cancel the request to Pioneer to reconvey the property and to request Pioneer to cancel the "full conveyance" of the land to the Lathrops, claiming that the United States breached the deed of trust agreement. It is *held* that since plaintiffs were strangers to the deed of trust agreement and absent a showing that the agreement was for their benefit, their claim as third-party beneficiaries must be denied. It is also *held* that the issue of title to the land having been decided adversely to plaintiffs, plaintiffs are bound by that decision by the principle of collateral estoppel, and the issue of title cannot be litigated again in this court; and that without title to the land plaintiffs have not alleged a claim against the United States on which relief can be granted. Plaintiffs are not entitled to recover, their motion for partial summary judgment is denied, defendant's motion for dismissal is granted, and the petition is dismissed.

Court of Claims jurisdiction; generally.

[1] The jurisdiction of the Court of Claims is confined to money judgments in suits against the United States, and if the relief sought is against others than the United States, for instance the General Services Administrator, it is not within the jurisdiction of this court.

Courts ⊂⊃ 449(1)

Contracts; parties; third-party beneficiary.

[2] Where B acquired from the county certain real property at a delinquent tax sale, the original owners L having previously executed and delivered a deed of trust to P to secure a note owed to the United States as mortgagee of the property, and where subsequently L paid its debt to the United States and the latter then directed P to reconvey the property to L pursuant to the terms of the deed of trust, and where thereafter the sale to B was judicially declared void because of failure of the county to send notice to L of assessment of delinquent taxes, B has no claim against the United States within this court's jurisdiction for damages and other relief as third-party beneficiary under the deed of trust because there was no privity of contract between B and the United States, B being neither a party to the deed of trust, to the reconveyance of the land to L nor to any transaction with the United States. Before

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a stranger can avail himself of the exceptional privilege of suing for breach of an agreement to which he is not a party, he must at least show that it was intended for his direct benefit.

United States ⟸ 70(5)

Judgments; former adjudication; collateral estoppel.

[3] Where the highest state court determined that plaintiffs did not have title to the subject property and that decision has not been set aside, plaintiffs are collaterally estopped from relitigating the issue of title in this court.

Judgment ⟸ 828(3.47)

Court of Claims jurisdiction; equity jurisdiction.

[4] This court is required to give full faith and credit to judicial decisions of each State so long as such decisions have not been set aside or overruled. This court has no authority to set aside such a decision as that would be the exercise of equity powers which it does not possess. Nor does this court possess authority to issue an order directing the United States to vacate its request to the trustee under the deed of trust to reconvey the land to the original owners or to take other action of like nature.

Judgment ⟸ 828(3.1)

Courts ⟸ 448

Trusts; recording of deed of trust.

[5] The purpose of recording a deed of trust is to give notice to everyone of its contents, but it does not create any rights in favor of strangers to the document.

Records ⟸ 19

Words and phrases; "reconvey."

[6] "Reconvey" means to restore (as an estate) to a previous owner. Where the deed of trust provided that upon payment of the note, the trustee was to reconvey, without warranty, the property involved, a conveyance by the United States as mortgagee of the property to individuals who acquired the property at a delinquent tax sale would not be a "reconveyance" to them nor a "restoration" to them as "previous owners."

Mortgages ⟸ 304

Mortgages; construction and operation; rights and liabilities of parties.

[7] Where, as is now generally the case, a mortgage is regarded as a mere security, it is certain that the mortgagee's interest, whatever name may be given it, is terminated by the payment of the debt secured, whether made before or after default, and no conveyance by the mortgagee is necessary to perfect the mortgagor's estate. In other words, upon payment of the debt all outstanding interests of the mortgagee in the land revert immediately to the mortgagor by operation of law.

Mortgages ⟸ 298(4)

Peter D. Bogart, pro se for plaintiffs.

Dennis A. Dutterer, with whom was *Assistant Attorney General Peter R. Taft*, for defendant.

Before SKELTON, NICHOLS, and BENNETT, *Judges*.

SKELTON, *Judge*, delivered the opinion of the court:

In this case, James H. and Yvonne Lathrop (the Lathrops) as mortgagors, on August 1, 1960, executed and delivered to Pioneer Title Insurance Company of Nevada (Pioneer), as trustee, a deed of trust to secure a note they owed to the United States (Mortgagee), in the sum of $9,280, on certain described lands containing 160 acres in Lyon County, Nevada, being the N.W. ¼ of Section 17, Township 17 North, Range 23 East, Mt. Diablo Base and Meridian; except the East ½ thereof. The deed of trust provided in paragraph 11 that after the note had been paid, Pioneer was to reconvey the property. Paragraph 11 of the deed of trust provided as follows:

> Upon written request of BENEFICIARY stating that all sums secured hereby have been paid, and upon surrender of this deed of trust and said note to TRUSTEE for cancellation and retention and upon payment of its fees, TRUSTEE shall reconvey, without warranty, the property then held hereunder. The recitals in such reconveyance of any matters or facts shall be conclusive proof of the truthfulness thereof. The grantee in such reconveyance may be described as "the person or persons legally entitled thereto."

The deed of trust also contained various provisions requiring the mortgagors to pay all taxes, insurance, and maintenance charges on the property, as well as all claims against it; and also provided that the mortgagee would enforce these provisions.

It developed that the Lathrops did not pay the taxes levied and assessed against the property as required by law and in May 1964, the property was sold to Lyon County, Nevada, by a tax deed because of the nonpayment of the taxes. The plaintiff, Peter Bogart, examined the records of Lyon County, and discovered that various parcels of land had been

sold to the county by tax deeds to satisfy delinquent taxes and that they would be auctioned to the highest bidder on a certain date. In "November/December 1965" the plaintiff, Punty Bogart acting through Peter Bogart, purchased the property at a public tax sale from Lyon County by a tax deed.

In August 1970, the debt of the Lathrops having been paid to the United States, the latter directed Pioneer to reconvey the property to the Lathrops in accordance with paragraph 11 of the deed of trust, which was done.

In 1974, the Lathrops filed suit in a Nevada state district court in Lyon County against Punty Bogart to set aside as void the tax sale of the property to Lyon County and the subsequent sale by the county to Punty Bogart on the ground that no notice had ever been mailed or delivered to them of the assessment of delinquent taxes, the delinquency deed, the tax sale, or their redemption rights. The district court granted summary judgment to the Lathrops, holding the tax sale to the county and subsequent sale to Punty Bogart void because of the failure of the county to send the above-described notice to the Lathrops. Punty Bogart appealed the case to the Supreme Court of Nevada, which handed down a judgment in *Bogart* v. *Lathrop*, 523 P. 2d 838 (Sup. Ct. 1974) affirming the judgment of the district court that the tax sale and subsequent proceedings were void, saying:

> Failure to send such notice [of assessments, delinquency, tax deed, tax sale, or redemption rights of respondents] resulted in a jurisdictional defect, which rendered all subsequent proceedings void. Jackson v. Harris, *supra* [64 Nev. 339, 183 P. 2d 161 (1947)]; Davison v. Gowen, 69 Nev. 273, 249 P. 2d 225 (1952), recognizing the general rule.
>
> * * * * *
>
> The order granting summary judgment [for the Lathrops] is affirmed. [*Id.* at 840.]

Plaintiff, Peter Bogart, alleges he is the husband of Punty Bogart and that as such he has marital rights in the property. No explanation is given as to how or why he has marital rights in the property during the lifetime of his wife. However, we do not need to belabor this point as it does not control our decision.

Plaintiffs indicate that after the Supreme Court of Nevada nullified their title to the property in question, they filed suit in federal court for relief, which suit is still pending, but no information is given where the suit is filed, what it involves, nor the status of the case. Again, we pass over this circumstance, as it would not affect our decision, unless, of course, it involves the identical question before us. If this is true, we have no knowledge of it.

On January 21, 1975, the plaintiffs filed this suit seeking over $10,000 in damages (the exact amount as yet undetermined) and for an order directing the defendants to vacate and cancel their request to the trustee to reconvey the property and directing the trustee to cancel the "full conveyance" of said land, and to record said cancellation in official records. The General Services Administrator is made a party defendant along with the United States. We agree with defendant that the jurisdiction of this court is confined to money judgments in suits against the United States and that if the relief sought is against others than the United States, it is not within the jurisdiction of this court. *United States* v. *Sherwood*, 312 U.S. 584, 588 (1941). Accordingly, the suit against the General Services Administrator must be dismissed as beyond the jurisdiction of this court.

The defendant has moved for a dismissal of the case on the ground that the plaintiffs have failed to state a claim upon which relief can be granted against the United States. The plaintiffs oppose the Government's motion and move for a partial summary judgment on liability. We hold for the Government.

Plaintiffs are not entitled to recover against the United States for several reasons. In the first place, there is no privity of contract between them and the Government with respect to the events in this case. The plaintiffs were not parties to the deed of trust, nor to the reconveyance of the land, nor to any transaction with the United States. Plaintiffs were complete strangers to the whole transaction. As far as the record shows, the Lathrops and the United States did not know the plaintiffs and did not even know they existed at any stage of the proceedings with reference to the deed of trust and reconveyance. Plaintiffs furnished none of the con-

sideration for the transaction between the Lathrops and the United States and were complete outsiders and strangers as far as those parties were concerned. No duties or obligations were owing from any of the parties to the deed of trust to the plaintiffs. Apparently the plantiffs are claiming damages on the theory that they are third party beneficiaries of the deed of trust. This is fanciful indeed, because, as stated above, none of the parties to the deed of trust even knew plaintiffs existed and could not, for that reason, among others, have intended that the deed of trust would be for their benefit. The general rule is set forth in *German Alliance Insurance Co.* v. *Home Water Supply Co.*, 226 U.S. 220, 230 (1912), wherein the Court held:

> * * * Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least show that it was intended for his direct benefit. * * *

It would be strange, indeed, to sustain plaintiff's argument that the deed of trust was made for their benefit when they were strangers to the transaction and the parties did not even know the plaintiffs. Other cases supporting the *German Alliance* case, *supra*, are *Hall* v. *Gardiner*, 126 F. 2d 227 (D.C. Cir. 1942); *United States* v. *Huff*, 165 F. 2d 720 (5th Cir. 1948); *Commonwealth of Pennsylvania* v. *National Association of Flood Insurers*, 378 F. Supp. 1339 (M.D. Pa. 1974); and 17 AM. JUR. 2D. *Contracts* §§ 302–319 (1964). The claim of plaintiffs as third party beneficiaries of the deed of trust must be, and is denied.

Plaintiffs are not entitled to recover because the Supreme Court of Nevada has held in the above *Bogart* case to which Punty Bogart was a party that the tax deed to Lyon County and all subsequent proceedings, which included the deed from the county to Punty Bogart, were void. That case decided and held that the plaintiffs have no title to the property. The decision in that case by the highest court in the State of Nevada has never been set aside and is the law as far as plaintiffs' lack of title is concerned. Plaintiffs are bound by that decision by the principle of collateral estoppel. *Edgar* v. *United States*, 145 Ct. Cl. 9, 171 F. Supp. 243 (1959); *Larsen* v. *United States*, 145 Ct. Cl. 178, 170 F. Supp. 806 (1959);

McGinty v. *United States*, 151 Ct. Cl. 399 (1960), *cert denied*, 368 U.S. 867 (1961); and *Brandt & Brandt Printers, Inc.* v. *United States*, 156 Ct. Cl. 582, 300 F. 2d 457 (1962). The issue of title was decided adversely to plaintiffs in the Nevada case and it cannot be litigated again in this court. Without title to the land, the plaintiffs have not alleged a claim against the United States on which relief can be granted.

Plaintiffs contend that the decision in Nevada against them in the *Bogart* case is null and void because it was obtained by fraud. We have read the decision of the Supreme Court of Nevada in that case and have found it to be regular and valid on its face, and we are required to give full faith and credit to it so long as it has not been set aside or overruled. We have no authority to set aside that decision, as that would be the exercise of equity powers which this court does not possess. *United States* v. *King*, 395 U.S. 1 (1968). For the same reason we have no authority to issue an order requested by plaintiffs directing the defendants to vacate and cancel their request to the trustee to reconvey and further directing the trustee to cancel the full conveyance of the land, and to record such cancellation in official records. If the plaintiffs wish to set aside the decision of the Supreme Court of Nevada, they will have to litigate the matter in a Nevada court having general equity powers.

Plaintiffs say that when the deed of trust was recorded it created a contract between the Government and the whole world so that if the Government failed to enforce the provisions of the deed of trust, anyone, including the plaintiffs, could sue the Government for damages. In line with this reasoning, plaintiffs argue that when the Government failed to see that the Lathrops paid the taxes on the land and failed to get tax receipts from them showing tax payments, the Government breached the contract with the whole world, including the plaintiffs. This argument has no substance and is frivolous. The purpose of recording a deed of trust is to give notice to everyone of its contents, but it does not create any rights in favor of strangers to the document, such as the plaintiffs here.

Plaintiffs also contend that the deed of trust provided that upon the payment of the note which it secured, the trustee was

required to reconvey the property to "the person or persons legally entitled thereto," and that since plaintiffs had acquired a tax deed to the land, they were the persons "legally entitled" to the conveyance by the trustee. This argument is unpersuasive. It will be noted that paragraph 11 of the deed of trust provided that upon the payment of the note, the trustee "shall reconvey, *without warranty*, the property" (emphasis supplied), and that "the grantee in such *reconveyance* may be described as 'the person or persons legally entitled thereto.'" (Emphasis supplied.) The word "reconvey" has a well-defined meaning. It is defined in Webster's Third New International Dictionary (1967 ed.) as follows:

> To convey back (as to a previous place or position); *to restore* (*as an estate*) *to a previous owner.* [Emphasis supplied.]

Such language did not include the plaintiffs. A conveyance to them by the Government would not have been a "reconveyance" to them nor a "restoration" to them as "previous owners." The language as to reconveyance clearly referred to the Lathrops. Furthermore, the deed of trust required the reconveyance to be "without warranty." Therefore, the reconveyance was not a guaranty or warranty of title by the Government, although the plaintiffs would have it otherwise.

It should be pointed out that under the general rule the title to the land automatically reverted to the Lathrops when the note was paid even if there had been no reconveyance to them. This rule is stated in 55 AM. JUR. 2d, *Mortgages* § 403 at 442 (1971), as follows:

> Where, as is now generally the case, a mortgage is regarded as a mere security, it is certain that the mortgagee's interest, whatever name may be given it, is terminated by the payment of the debt secured, whether made before or after default, and *no conveyance by the mortgagee is necessary to perfect the mortgagor's estate.*[11] *In other words, upon payment of the debt all outstanding interests of the mortgagee in the land revert immediately to the mortgagor by operation of law.* [Emphasis supplied.]

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[11] * * *; *Nilson* v. *Sarment*, 153 Cal 524, 96 P 315; * * *. [Footnote 12 omitted.]

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Accordingly, the reconveyance by Pioneer to the Lathrops added nothing to their estate in the land that they had when the note was paid. Under these circumstances, the Government could have no liability to the plaintiffs by reason of the reconveyance by Pioneer.

In view of our conclusions set forth above, we do not reach the various other arguments and contentions of the plaintiffs.

We hold that the plaintiffs are not entitled to recover, and that judgment should be entered for defendant.

Plaintiffs' motion for partial summary judgment is denied, defendant's motion for dismissal is granted, and plaintiffs' petition is dismissed.

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531 F. 2d 543

GEORGE E. DECKER AND EFFIE J. DECKER v. THE UNITED STATES

[No. 142–75. Decided March 17, 1976]

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Taxes; interest; interest on addition to tax for fraud; accrual of interest; jeopardy assessment.—The Internal Revenue Service, pursuant to Sec. 6861(a) of the Internal Revenue Code of 1954, made jeopardy assessments against plaintiffs for income tax deficiencies, including a 50% addition to their tax for fraud, for tax years 1962, 1963, and 1964. Plaintiffs filed a timely petition with the United States Tax Court requesting a redetermination of the deficiencies. Prior to the decision of the Tax Court and in accordance with a stipulated settlement, plaintiffs, on May 2, 1974, paid the asserted deficiencies. Plaintiffs seek to recover $1,460 in interest on the 50% addition to tax which they paid and which they claim was erroneously assessed from the date of the jeopardy assessments to the date of their advance payment. It is *held* that since, absent the jeopardy assessments, payment of the 50% addition could not have been assessed and demanded until after a final decision of the Tax Court, it is this latter date that is the last date otherwise prescribed for payment of the said 50% addition. Because the notice and demand issued to plaintiffs pursuant to the jeopardy assessments preceded the last date otherwise prescribed for payment of the 50% addition, Sec. 6601(c)(3) bars the Service from assessing and collecting interest on said addition to tax. Defendant's motion for summary judgment is denied. Plaintiff has not filed a motion for summary judgment and accordingly the case is remanded to the trial judge for trial or other appropriate disposition.

Taxes; interest; interest on underpayments; generally.

[1] Generally, interest on any unpaid tax is assessed from the last date prescribed for payment of the tax to the date that payment is received (Internal Revenue Code of 1954, § 6601(a)). Sec. 6601(c)(3) in turn provides that the last date prescribed for payment shall be determined without regard to any notice and demand for payment issued, by reason of jeopardy, prior to the last date otherwise prescribed for such payment.

Internal Revenue ⇐ 1747

Taxes; interest; interest on addition to tax for fraud; accrual of interest; jeopardy assessment.

[2] Where the Internal Revenue Service made jeopardy assessments pursuant to Sec. 6861(a) of the Internal Revenue Code of 1954 against taxpayers, including a 50% addition to their income tax for fraud, taxpayers' liability for interest on the 50% addition accrued on the date the said addition would have been due absent the jeopardy assessments. Internal Revenue Code of 1954, § 6601(c)(3). Congress intended, by enacting Sec. 6601(c)(3), to prevent interest from accruing by virtue of the Service's use of the jeopardy assessment provisions where such interest would not have accrued had the Service not invoked those provisions.

Internal Revenue ⇐ 1747

Paul P. Lipton, attorney of record, for plaintiffs. *Richard A. Petrie*, of counsel.

James L. Malone III, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. Theodore D. *Peyser* and *Robert S. Watkins*, of counsel.

Before COWEN, *Chief Judge*, KUNZIG and BENNETT, Judges.

PER CURIAM: This case requires us to determine the point at which interest begins to accrue on civil fraud penalties assessed pursuant to the jeopardy assessment provisions of the Internal Revenue Code. The relevant facts are not in dispute. On May 19, 1972, the Internal Revenue Service (IRS), pursuant to Section 6861(a) of the Internal Revenue Code of 1954,[1] made jeopardy assessments against plaintiffs, George

[1] Section 6861(a) provides for the immediate assessment of a deficiency, as defined in Section 6211, whenever the assessment or collection of the deficiency would be jeopardized by delay. Int. Rev. Code of 1954, § 6861(a). By allowing for the immediate assessment of an asserted deficiency, Section 6861(a) provides an exception to the general rule barring any assessment until the taxpayer has received a notice of deficiency and has been given an opportunity to seek a redetermination of his tax liability in the Tax Court.

and Effie Decker, for deficiencies in income tax, including a 50% addition to the tax for fraud,[2] for the tax years 1962, 1963, and 1964.[3] A statutory notice of deficiency, required by Section 6861(b),[4] was mailed to plaintiffs, who then filed a timely petition with the United States Tax Court requesting a redetermination of the deficiencies set forth in the notice.

On May 13, 1974, pursuant to a stipulated settlement, the Tax Court entered its decision. In advance of that decision, but in accordance with the stipulated settlement, plaintiffs paid $45,912.55 to the IRS in satisfaction of the asserted deficiencies. On January 10, 1975, plaintiffs filed refund claims for the years in question on the ground that approximately $1460.00 of interest had been erroneously assessed on the 50% addition to tax from May 19, 1972, the date of the jeopardy assessments, to May 2, 1974, the date of plaintiffs' advance payment.[5] Upon receiving notice that their claims for refund had been disallowed, plaintiffs instituted this suit. The case is now before the court on defendant's motion for summary judgment and plaintiffs' opposition thereto. The narrow question we must decide is when interest begins to accrue on a 50% addition to tax that is assessed by reason of jeopardy in advance of the date that it would otherwise be due.

Both parties agree that if the IRS had refrained from making jeopardy assessments, it could not have demanded

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Laing v. *United States*, 423 U.S. 161, n. 14 (1975); *see* Int. Rev. Code of 1954, §§ 6211–16 (procedural rules that govern when collection is not in jeopardy).

[2] Section 6653(b) provides that if any part of an underpayment of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. Int. Rev. Code of 1954, § 6653(b).

[3] Concurrent notice and demand for payment of the amounts assessed was transmitted to plaintiffs, as required by Section 6861(a). Int. Rev. Code of 1954, § 6861(a); *see* Treas. Reg. § 301.6861–1(d).

[4] Int. Rev. Code of 1954, § 6861(b). Jeopardy assessments may be made without prior notice to the taxpayer that his tax returns are being audited, and are frequently made before the taxpayer is sent a statutory notice of deficiency. Note, *Jeopardy Assessment: The Sovereign's Stranglehold*, 55 Geo. L.J. 701, 703 (1967). Section 6861(b), however, provides that where a prior deficiency notice has not been sent, the IRS must send such notice within 60 days after making the jeopardy assessment. Int. Rev. Code of 1954, § 6861(b). The issuance of a deficiency notice is a jurisdictional prerequisite to litigation in the Tax Court. *Id.* § 6213(a).

[5] Plaintiffs did not dispute the determination of the amount by which plaintiffs fraudulently underpaid their taxes for 1962 through 1964 or the amount of interest assessed and collected on that underpayment.

payment of the 50% addition to tax until there was a final decision by the Tax Court, and that interest would not have been assessed on the 50% addition if payment was made within 10 days of demand.[6] Defendant, however, contends that a different result should be reached where, as in this case, after notice and demand for payment is issued pursuant to a jeopardy assessment, the taxpayer fails to make payment within 10 days. Under such circumstances, defendant argues that the IRS can properly assess interest on the addition to tax from the date of notice and demand to the date of payment.[7]

Plaintiffs, on the other hand, argue that the jeopardy assessments and the concurrent notice and demand for payment thereof must be disregarded in determining plaintiffs' liability for interest on the 50% addition to tax, and that this result is dictated by Section 6601(c)(3). Int. Rev. Code of 1954, § 6601(c)(3) (redesignated as § 6601(b)(3), effective July 1, 1975). For the reasons set forth below, the court concludes that plaintiffs' basic contention is correct, and that defendant's motion for summary judgment should be denied.

The general rule for determining the period for which interest shall accrue on any tax obligation is set forth at Section 6601(a), which provides that interest on any unpaid tax is to be assessed from the last date prescribed for payment of the tax to the date that payment is received. Int. Rev. Code of 1954, § 6601(a); *see* Treas. Reg. § 301.6601–1(a)(1). Section 6601(c)(3) in turn provides that:

> The last date prescribed for payment shall be determined without regard to any notice and demand for payment issued, by reason of jeopardy (as provided in

[6] *Reply Brief of the United States in Support of Its Motion for Summary Judgment*, at 6 n. 3; *Plaintiffs' Opposition to Defendant's Motion for Summary Judgment*, at 7–8; *see* Int. Rev. Code of 1954, § 6213(a). The decision of the Tax Court becomes final upon the expiration of the time allowed for filing notice of appeal. Int. Rev. Code of 1954, § 7481(a)(1). If appeal is taken, special rules must be applied to determine when the decision becomes final. *See id.* §§ 7481(a)(2)–(4).

[7] Int. Rev. Code of 1954, § 6601(f)(3) (redesignated as § 6601(e)(3), effective July 1, 1975); Treas. Reg. § 301.6601–1(f)(3). Section 6601(f)(3) provides that:

"Interest shall be imposed * * * in respect of any assessable penalty, additional amount, or addition to the tax only if such assessable penalty, additional amount, or addition to the tax is not paid within 10 days from the date of notice and demand therefor, and in such case interest shall be imposed only for the period from the date of the notice and demand to the date of payment."

chapter 70), prior to the last date otherwise prescribed for such payment.

The House and Senate committee reports accompany the enactment of this provision note that it is—

> designed to cover those cases where, by reason of jeopardy, payment is demanded before the due date otherwise prescribed. In such cases, interest will not begin to run prior to the date otherwise prescribed, since the jeopardy procedure is merely designed to obtain advance payment of the tax.

H. Rep. No. 1337, 83d Cong., 2d Sess., at A417–18 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 589 (1954).

Defendant maintains that a close reading of this excerpt from the committee reports reveals that Section 6601(c)(3) was intended to "apply only in a situation where a jeopardy assessment for any given year is made prior to April 15—which, of course, is the last date otherwise prescribed for payment of any tax required to be shown on the return." *Reply Brief for the United States in Support of Its Motion for Summary Judgment*, at 3. Accordingly, defendant would have us hold that this case is not governed by Section 6601(c)(3) since the jeopardy assessments involved herein were made after the last dates prescribed for payment of plaintiffs' income taxes, i.e., April 15 of 1963, 1964, and 1965.

The court, however, is unable to subscribe to such a narrow interpretation of the remedial effect of Section 6601(c)(3). The better view, in our opinion, is that Congress intended by enacting Section 6601(c)(3) to prevent interest from accruing by virtue of the IRS' use of the jeopardy assessment provisions where such interest would not have accrued had the IRS not invoked those provisions. The committee reports specifically state that "the jeopardy procedure is *merely designed to obtain advance payment of the tax.*" H. Rep. No. 1337, 83d Cong., 2d Sess., at A417–18 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 589 (1954). Under defendant's view, the IRS, by invoking the jeopardy assessment provisions, not only would obtain advance payment of the additions to tax, but would also recover interest on the additions to which it would not otherwise be entitled. Such a result would clearly

conflict with the views expressed by Congress in enacting Section 6601(c)(3).

If jeopardy assessments had not been made in this case, it is undisputed that payment of the 50% addition to plaintiffs' income tax liability could not have been demanded until after a final decision by the Tax Court on plaintiffs' petition. See note 6 *supra*. Accordingly, we find that it is this latter date, i.e., the date that the addition to tax would have been due in the absence of the jeopardy assessments, that is the last date otherwise prescribed for payment of the 50% addition to plaintiffs' tax.[8] Since the notice and demand issued to plaintiffs pursuant to the jeopardy assessments preceded the last date otherwise prescribed for payment of the 50% addition to tax, Section 6601(c)(3) bars the IRS from assessing and collecting interest on the addition to tax.[9] To hold otherwise would, in effect, penalize plaintiffs for having exercised their statutory right to seek a redetermination in the Tax Court of their deficiency.

For the foregoing reasons, it is ordered that defendant's motion for summary judgment is denied. Since plaintiffs have not filed a motion for summary judgment, the case is remanded to the trial judge for trial or other disposition in accordance with this opinion.

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[8] *See* Int. Rev. Code of 1954, § 6155; Treas. Reg. § 301.6155–1. Section 6155 provides that:

"Upon receipt of notice and demand from the Secretary or his delegate, there shall be paid at the place and time stated in such notice the amount of any tax (including any interest, additional amounts, additions to tax, and assessable penalties) stated in such notice and demand."

If the taxpayer pays the amount due within 10 days after notice and demand, no interest is assessed. Int. Rev. Code of 1954, § 6601(f)(4) (redesignated as § 6601(e)(4), effective July 1, 1975).

[9] Relying on Section 6601(c)(4), defendant suggests that even if Section 6601(c)(3) is deemed applicable, we nevertheless should conclude that the last date prescribed for payment of a 50% addition to tax is the date of notice and demand, regardless of whether it was issued pursuant to a jeopardy assessment. Int. Rev. Code of 1954, § 6601(c)(4) (redesignated as § 6601(b)(4), effective July 1, 1975). Section 6601(c)(4), however, only applies where "the last date of payment is not otherwise prescribed." *Id.* In this case, as indicated above, the last date otherwise prescribed is the date the 50% addition to tax would have been payable in the absence of the jeopardy assessments or, in other words, the date set by Section 6155. Thus, since the last date is otherwise prescribed, Section 6601(c)(4) is inapplicable. *See Motor Fuel Carriers, Inc.* v. *United States*, 190 Ct. Cl. 385, 395 & n. 11, 420 F. 2d 702, 708 & n. 11 (1970).

Syllabus

531 F. 2d 993

A. C. BALL COMPANY v. THE UNITED STATES

[No. 588–71. Decided March 17, 1976]

ON THE PROOFS

Renegotiation of contracts; redetermination of excessive profits; factors to be considered in determining excessiveness.—Plaintiff is a California corporation which in its fiscal year 1967 was engaged almost exclusively in supplying a variety of products to the Government for use during the Vietnam war under numerous competitively bid firm, fixed-price contracts. Plaintiff was never a "sole source" supplier nor were its products "off the shelf." After a contract award, plaintiff subcontracted for most of the production steps to small businesses throughout the country, procurement and supervision of subcontractors, testing and assembly being plaintiff's main functions. The business was founded and operated by a husband and wife (president and secretary, respectively, as well as joint owners of its stock). At the beginning of the review year they employed 19 employees which were increased to 35 by year's end, and they operated in 12,000 sq. ft. of space in a building owned by them. The key to the success of the business was the abilities and energies of the two principals, plus a general manager and later vice-president, particularly Mr. Ball's expertise and industry in bidding; he filed numerous bids daily without seeking quotes and relying on his knowledge of costs. Mrs. Ball handled financial affairs, office and paper work, also helping out in the production department when needed. All three worked long hours, sometimes as much as 90 hours a week. Since the business relied heavily on subcontracting, capital and net worth were small in comparison to sales and profits. Dissatisfied with the determination of the Renegotiation Board that it realized excessive profits of $250,000 on renegotiable sales of $2,582,942 during fiscal 1967, plaintiff seeks de novo redetermination of the excessive profits, if any. After careful consideration of all the facts, the statutory factors for determining excessiveness, and the submissions of the parties, it is *held*, based on a broad-brush judgment in the nature of a "jury" verdict, that plaintiff realized excessive profits in the gross amount of $50,852. Judgment is entered for the United States on its counterclaim in said amount, less appropriate state and federal tax credits, plus appropriate interest thereon.

Renegotiation of contracts; redetermination of excessive profits; exemption, amount of; jury verdict.

[1] Where the trial judge after applying to all of plaintiff's renegotiable business the statutory factors in determining its amount of excessive profits, was unable wholly to reject or wholly to accept the proposition that plaintiff's profits resulted from absence of

Syllabus

competition due to wartime demand, and postulated competition as to one-half and absence of competition as to the other half, it was not legal error for him to make a judgment in the nature of a "jury verdict" and to determine no excessive profits as to the former and excessive profits as to the latter. It is the kind of broad-brush technique the Renegotiation Act frequently demands.

War and National Defense ⇐ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered.

[2] Sec. 103(e) of the Renegotiation Act prescribes the factors to be considered in determining excessive profits, the primary factor, and the one to which favorable recognition must be given, being efficiency of the contractor. The other factors are: character of the business and its risks, contribution to the war effort, the contractor's net worth and reasonableness of its costs and profits, and public interest and principles of fair dealing. Reasonable, non-excessive profits under the Act are to be determined by overall evaluation of the particular factors present (32 C.F.R. § 1460.8(a)).

War and National Defense ⇐ 59

Renegotiation of contracts; redetermintaion of excessive profits, factors to be considered; efficiency of contractor.

[3] In determining the amount of excessive profits, if any, realized by a Government contractor making and supplying a variety of parts and devices of all sizes and shapes, such as wheels, screws, fittings, etc., whose business was founded and operated by the founder and his wife, which was never a sole source supplier and whose products were never "off the shelf" but were made from Government drawings accompanying solicitations for competitive bids on firm, fixed-price contracts, favorable consideration should be given where the quality of the work was very good, the quantity was eminently satisfactory, it worked with great industry in small quarters with minimum overhead and minimum staff to produce a very substantial, increasing volume of good quality goods, it was able to and did lower its bid on a second contract for the same item and passed the benefits on to the Government, and it utilized small businesses throughout the United States as subcontractors to whom it provided active assistance in various areas including suggestions as to more economical means of production, thus contributing to the welfare of small business and furthering the national policy of encouragement of subcontracting to small business.

War and National Defense ⇐ 59

Renegotiation of contracts; redetermination of excessive profits; minimum amount subject to renegotiation; reasonable executive compensation.

[4] Costs to be deducted from gross renegotiable receipts to arrive at profits are those estimated to be allowed as deductions and exclusions under the Internal Revenue Code. Accordingly, determina-

Syllabus

tion of reasonable executive compensation is the same as in tax cases under Sec. 162(a)(1) of the Internal Revenue Code of 1954, namely, that reasonable and true compensation, to be determined on all the facts, no one of which is controlling, is only such amount as would ordinarily be paid for like services by like enterprises under the circumstances.

War and National Defense ⇐ 59

Renegotiation of contracts; redetermination of excessive profits; evidence; burden of proof.

[5] Although there is a presumption in favor of determinations of the Commissioner of Internal Revenue, such as where the Commissioner on audit disallowed the total compensation paid to corporate executives and determined reasonable compensation, this presumption is not transferable to suits of a different character, especially to a renegotiation case, where the hearing is de novo and the burden of proving the Commissioner's conclusion to be correct is on the Government, with the burden as to the entire case.

Internal Revenue ⇐ 1307

Renegotiation of contracts; redetermination of excessive profits; evidence; burden of persuasion.

[6] Plaintiff has the burden of going forward as to the accuracy of the financial data going to the amount of its profits and the reasonableness of executive compensation. Final persuasion on the reasonableness of compensation is influenced by the circumstance of a large amount of claimed overhead paid to sole stockholder-executives, since this type of payment is subject to close scrutiny in order to insure that salaries and bonuses are not being used as a vehicle for siphoning off otherwise taxable, or renegotiable, profits.

War and National Defense ⇐ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; reasonableness of costs and profits; executive compensation.

[7] In determining whether compensation paid to plaintiff's president was reasonable, comparable industry salaries have only limited applicability where the officer was the brain and driving force of the entire business sometimes working 90 hours a week, and his skills and devoted efforts in bidding, finding, assisting and monitoring subcontractors and in designing and supervising final in-house assembly of parts produced by numbers of sub-contractors were the largest part of the efforts responsible for plaintiff's operations and success. As to the wife, the secretary of plaintiff, she is comparable to the "average" executive, and in determining reasonableness of her compensation her relatively low rank of secretary must be balanced out by her varied contributions and her devotion to the business.

War and National Defense ⇐ 59

Syllabus

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; reasonableness of costs and profits; inventory valuation.

[8] Where the method of evaluating plaintiff's work-in-process inventory as established by its outside accountant, upon recalculation proved accurate to within 1 percent, without the use of the criticized percentage additions and reductions and with none of the entries challenged by defendant, the court will accept the method actually used by plaintiff as a reasonably correct reflection of actual values and one appropriate to the needs of the small business involved.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; extent of risk assumed.

[9] An essential quality of the firm, fixed-price contract is that the contractor assumes responsibility for his costs, with the inevitable risk that greater costs will be incurred than anticipated, and that losses will be suffered, this risk being intensified during shortages accompanying war. Thus, plaintiff, who supplied a variety of different products to the Government during the Vietnam hostilities under firm, fixed-price contracts containing clauses not negotiable in bidding and imposing rigorous obligations, is entitled to favorable consideration as to the extent of economic risk assumed in determining the amount of its excessive profits, where it received little special tratment by "special source" advertisements, "set-aside" quantities limited to small business, or from failures or omissions of other lower bidders; its business was heavily dependent on subcontractors; it suffered mishaps because of errors in interpreting old and defective drawings; there were risks in bidding on a product for the first time, in guaranteeing delivery schedules, in subcontractors' failure to perform, especially where numerous subcontractors were to perform in sequence interlocking operations on one product, since plaintiff had to face the consequences as guarantor; the subcontractors often operated with price escalation clauses in their favor whereas plaintiff did not; and where performance was accomplished at a time when Government demand was substantially increasing with a larger volume of sales.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; extent of risk assumed.

[10] In determining the extent of economic risk assumed by plaintiff, it is proper to accord highly favorable consideration to plaintiff's severe financial losses in the two years following the fiscal year in issue though the nature of its business remained the same except that Government demand increased. This approach is confirmed in 32 C.F.R. § 1460.12(b) (1) and in S. Rep. 92-245 (1971).

War and National Defense ⟸ 59

Syllabus

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; contribution to defense effort.

[11] In determining the amount of excessive profits, if any, realized by plaintiff, consideration should be given to plaintiff's contribution in producing an abundance of high quality goods needed for prosecution of the Vietnam war by skillful and energetic marshalling of the efforts of small subcontractors throughout the country who might otherwise have been overlooked or passed by.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; net worth and capital employed.

[12] Since plaintiff's business is not a capital-intensive business, but one involving mainly management and productive skills devoted to the organization of the capital resources of others (its subcontractors), the return on capital invested is not an appropriate measure for determining reasonableness of plaintiff's profits under this factor.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; reasonableness of costs and profits.

[13] In determining the amount of excessive profits, if any, realized by plaintiff, the Renegotiation Act directs that the reasonableness of costs and profits be considered with particular regard to volume of production, normal earnings, and comparison of war and peacetime products. Absent normal earnings or peacetime products sufficient for useful assessment, as regards plaintiff's volume of production consideration should be given to the fact that while its profits were in part the product of the decline in competition by reason of the Government's expanded program for procurement of war goods, plaintiff's own competitive efforts during the year in issue were a substantial cause and source of its prosperity, plaintiff taking no undue advantage of the distorted war market, but rather producing in volume competitively and efficiently to meet the added demand.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; public interest and fair dealing.

[14] In determining the amount of excessive profits, if any, realized by a contractor, the public interest factor requires both that unreasonable profits be recouped and that sufficient profit be allowed as will promote production in volume of quality goods for use in war and defense production. Fair and equitable dealing with the contractor demands that he be given full measure of the favorable consideration contemplated by the statute.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; reasonableness of costs and profits.

[15] Where the record provides no basis for a precise division of the dual causation of plaintiff's profits as between plaintiff's merits and the market distorted by war, in determining excessiveness on all the facts and in consideration of the statutory factors, on a jury verdict basis half of plaintiff's renegotiable sales were the product of its competitiveness, unaffected by the wartime decline in competition, and as such not excessive; the remaining half were affected by wartime decline in competition and subject to renegotiation as excessive.

War and National Defense ⇐ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; reasonableness of costs and profits; comparable industry.

[16] Where the statistics of profits earned by the industry closest to plaintiff's classification has a range of profit, i.e. profit as a ratio of sales, 4.38% to 14.58%, and other industries were inapplicable because of the complexities and hazards of plaintiff's business and the variety of products it produced, in consideration of the statutory factors and in favorable recognition of plaintiff's efficiency, effort, competitiveness, risks assumed, and encouragement of small business, the maximum 14.58% is utilized absent proof by the Government that plaintiff should be compared with the manufacturer at the bottom, mid-point or any particular point on the scale from 4.38% to 14.58%.

War and National Defense ⇐ 59

Travis M. Jackson, attorney of record for plaintiff. *Truce, Veal & Jackson*, of counsel.

Robert N. Ford, with whom was *Assistant Attorney General Rex E. Lee*, for defendant. *Robert E. Tressel*, of counsel.

Before SKELTON, NICHOLS and BENNETT, *Judges*.

PER CURIAM: This case comes before the court on plaintiff's and defendant's exceptions to findings of fact and recommended decision submitted on January 14, 1975, by Trial Judge David Schwartz, in accordance with Rule 134 (h). He redetermined *de novo* after trial the alleged excessive profits received or accrued by plaintiff in its fiscal year 1967 on defense contracts and subcontracts, under 50 U.S.C. App. §§ 1212 *et seq.* § 1218, as amended, fixing the amount

of said excessive profits at $50,852 out of total renegotiable profits of $478,297.

The case has been submitted to the court on the briefs of the parties and oral argument of counsel. Upon consideration thereof, since the court agrees with the said recommended decision, as hereinafter set forth, it hereby affirms and adopts the same as the basis for its judgment in this case.

The Government argued before us that the trial judge exempted half of plaintiff's profits, without authority in any statutory exemption. We find this argument little more than rhetoric. There is a wide difference between exempting a contractor from renegotiation and renegotiating him but determining he realized no excessive profits. The Government urged below, as it did here, that plaintiff's profits resulted from absence of competition due to wartime demand. The trial judge felt unable wholly to reject or wholly to accept this view. For lack of any better way, he decided on what he called a "jury verdict" applying it to half only of plaintiff's profits. Applying all the statutory factors to all of plaintiff's renegotiable business, but postulating competition as to one-half and absence of competition as to the other half, the trial judge determined no excessive profits as to the former, and $50,852 excessive profits as to the latter. We see no legal error in this. It is the kind of broad-brush technique the Renegotiation Act frequently demands.

Perhaps the words "jury verdict" are overused in our decisions, and such words could not legitimize an otherwise illegitimate technique, but any trier of fact, jury or judge, at times encounters situations where he must either abnegate his function, or make broad estimates on the basis of data of the most indefinite kind. *See, e.g., Meredith Broadcasting Co.* v. *United States*, 186 Ct. Cl. 1, 24, 405 F. 2d 1214, 1227 (1968), and the problem is pointed up in Judge Collins' dissent, 186 Ct. Cl. at 31, 405 F. 2d at 1231.

A jury returning a general verdict cannot explain or justify the reasoning it has used, or state the subsidiary facts it has found. A reviewing appellate court must speculate as to these matters. One of our trial judges can and usually does explain just why and how he reached a decision, even when he employs, as here, a quotient or averaging technique, or

strikes a level between the contentions of the parties, neither accepting nor rejecting fully the position of any party or witness. Therefore, in a case such as this, "jury verdict" may be hardly the *mot juste*.

The trial judge took proper notice under the statutory "risk" factor of the contractor's severe loss in 1969, though the nature of its business remained the same except for larger volume. He cites in fn. 5, a Renegotiation Board regulation calling for "special consideration" to be given such cases. He might also have mentioned that in 1971, in reporting Pub. L. 92–41, which transferred redetermination jurisdiction from the Tax Court to this court, the Senate Finance Committee referred to the inequitable results sometimes resulting from a tunnel-visioned use of the fiscal year method of renegotiation, and commended a variety of methods the Board used to alleviate these effects. One was:

* * * * *

> 5. The Board gives consideration to evidence showing risks through actual realization of losses incurred by the contractor in performing contracts in other years similar to the contracts undergoing renegotiation. * * *

The Committee further agreed that—

> * * * the Renegotiation Board (and the Court of Claims in redetermination cases) should give *greater emphasis* to the applicability of these various forms of relief. * * * (Emphasis supplied).

Senate Report No. 92–245. June 29, 1971, 1 U.S. Code, Cong. & Admin. News (1971) 1130, 1133. The similar House Report is not there reprinted. It would seem the Congress was dissatisfied with the degree of emphasis that had been accorded hitherto, despite the regulation, and the Renegotiation Board had closed this case before 1971, in 1969. *See*, also, Nichols, *Equalizing Profit And Loss In Renegotiation*, 45 Va. L. Rev. 41 (1959). The trial judge accorded plaintiff "highly favorable consideration under the risk factor", and under the circumstances, nothing less would have been sufficient.

Accordingly, the court determines as a matter of law that plaintiff realized excessive profits in the gross amount of

$50,852 from contracts and subcontracts subject to renegotiation under the Renegotiation Act of 1951, as amended, and it is Ordered that judgment be and the same is entered for the United States on its counterclaim in the said sum of Fifty thousand eight hundred and fifty-two dollars ($50,852), less appropriate state and federal tax credits, plus appropriate interest thereon.

Trial Judge Schwartz's opinion, which is adopted by the court, follows. His findings of fact and conclusion of law are omitted, but have been furnished to the parties, and are approved. The facts appear in the opinion so far as relevant to our review.

OPINION OF TRIAL JUDGE

SCHWARTZ, *Trial Judge:* Plaintiff, dissatisfied with a unilateral determination of the Renegotiation Board under the Renegotiation Act of 1951, as amended, that in plaintiff's fiscal year 1967 it realized excessive profits in the amount of $250,000 on renegotiable sales of $2,582,942, has instituted this proceeding for a de novo judicial redetermination of its excessive profits under section 108 of the Act. 65 Stat. 7 (1951), as amended, 50 U.S.C. App. §§ 1212 *et seq.*, § 1218 (1970), as amended. The action was first brought in the United States Tax Court and removed to this court following the transfer here of jurisdiction over such actions, provided in Public Law 92–41, effective July 1, 1971. Section 2(b), 3(a), 85 Stat. 97, 98 (1971), 50 U.S.C. App. § 1218 (Supp. II 1972).

A preliminary controversy relates to the amount of profits earned by plaintiff in the year under review. Defendant seeks to add to profits as shown by plaintiff's books the amount by which the year-end inventory of work in process is alleged to have been overvalued, and also an amount by which compensation paid to stockholder-executives is said to have been unreasonable and excessive. The contention as to inventory is here rejected and the contention as to executive compensation is here upheld, to the extent of $59,324. The addition of this sum of $59,324 to plaintiff's profits gives total profits of $481,281 for 1967, to be considered for excessiveness.

Section 103(e) of the Renegotiation Act prescribes seven "factors" to be considered in the determination of excessive profits. The primary factor is the efficiency of the contractor; for it, "favorable recognition must be given" the contractor. The other factors, to be "taken into consideration," are the character of the business and its risks, its contribution to the war effort, the net worth and the reasonableness of the costs and profits of the contractor, and, finally, the public interest and principles of fair dealing. 50 U.S.C. App. § 1213(e) (1970).[1]

Reasonable, non-excessive profits under the Act are to be determined by overall evaluation of the particular factors present. 32 CFR § 1460.8(a) (1974). There is no more precise formula for the determination of excessiveness under section 108 of the Act.

On consideration of all the factors, plaintiff's profits in its tax year 1967 are determined to have been excessive in the amount of $50,852. Detailed findings of the facts relevant to the several statutory factors accompany this opinion. Each factor will be separately discussed; the controverted aspects

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[1] Section 103(e) (50 U.S.C. § 1213(e) (1970)) of the Act provides as follows:

"*Excessive profits.*

The term 'excessive profits' means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this title to be excessive. In determining excessive profits favorable recognition must be given to the efficiency of the contractor or subcontractor, with particular regard to attainment of quantity, and quality production, reduction of costs, and economy in the use of materials, facilities, and manpower; and in addition, there shall be taken into consideration the following factors:

(1) Reasonableness of costs and profits, with particular regard to volume of production, normal earnings, and comparison of war and peacetime products;

(2) The net worth, with particular regard to the amount and source of public and private capital employed;

(3) Extent of risk assumed, including the risk incident to reasonable pricing policies;

(4) Nature and extent of contribution to the defense effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

(5) Character of business, including source and nature of materials, complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

(6) Such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted."

of plaintiff's profits will be postponed to follow the discussion of some of the factors.

Character of Plaintiff's Business

The factor most usefully first discussed is the character of plaintiff's business (section 103(e), note 1, *supra*):

> (5) Character of business, including source and nature of materials, complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

Plaintiff is a California corporation which in its fiscal year 1967 was engaged almost exclusively in the performance of Government military supply contracts, all renegotiable. The work for non-Government customers was less than 1 percent of the total. Plaintiff was awarded 130 contracts during the year and made shipments under 142. Total sales were $2,599,060 of which 99.38 percent of $2,582,942 were renegotiable sales. Profits were $481,281, of which profits attributable to renegotiable sales were $478,297, or, expressing profit as a percentage of sales, 18.5 percent.

Plaintiff made a great variety of parts and devices of all sizes and shapes such as wheels, screws, fittings, couplings, components of other devices, valve replacement "mechanisms," screens, and various kinds of assemblies. Customers were Air Force bases, arsenals and defense and military agency construction supply and general supply centers. Quantities usually were small, ranging from one to 1,000 with one exception. One of plaintiff's jobs, the construction of wheel assemblies for a type of landing tank used by the Marine Corps, was far larger than any others, accounting for approximately $900,000 in sales, or almost 35 percent of the total.

Plaintiff was never a "sole source" supplier and its products were never "off the shelf." All the products were made from Government drawings accompanying solicitations circulated by the Government as Invitations for Bids, Requests for Bids and Requests for Quotes.

All of plaintiff's contracts were awarded following competitive bidding, and substantially all of the work was done

under firm, fixed-price Government contracts. Over 90 percent of the contracts contained the Government standard conditions for supply contracts.

Manufacture usually required a succession of steps and processes—casting, boring, plating, painting and so on, and one or more subassemblies, before final assembly, packaging and shipping. While the techniques required for these processes were usually not complex, some of the items were complex and some of the drawings contained errors and ambiguities. Manufacture particularly presented special problems when plaintiff was making the item for the first time, as often happened.

The production system utilized by plaintiff was highly complex. After bidding and obtaining the contract, plaintiff subcontracted for most of the production steps, such as forging and casting, the finished parts being returned to plaintiff's premises for final assembly and packaging. Plaintiff also did testing, some painting, and shipping. Bidding, the procurement and supervision of subcontractors, and assembly were plaintiff's main functions.

The business was founded and operated by a husband and wife, Mr. Alfred C. Ball and Mrs. May F. Ball. Working together with great industry and with some small earlier experience in a similar business, Mr. and Mrs. Ball started the present business in 1965 as an offshoot of their business as distributors of ball bearings. They had no employees other than themselves. In that year their sales were $105,000, with profits of about $14,000. Mr. Ball would bid on a small Government contract, say for a few fittings for a navy yard or an arsenal, and if he got the award he would go out and arrange for the work to be done. Mrs. Ball handled the office and all the paper work. As more contracts were obtained, the business prospered and three or four helpers were hired.

In the first half of 1966, sales amounted to almost $300,000, an average monthly rate of $50,000. In the next 2 months, before the beginning, on September 1, 1966, of the fiscal year under review, sales averaged $75,000 monthly. In the next year, the review year, total sales were, as noted, $2,599,060, a monthly rate of over $210,000. Plaintiff's books showed direct costs of $1,828,805, overhead of $348,298, and profits of

$421,957. (As adjusted in consequence of decisions in this opinion, overhead was $288,974 and profits $481,281.)

When the business was incorporated in June 1966, the Balls had 10 employees. Mr. and Mrs. Ball were now, respectively, the president and the secretary of the company as well as joint owners of its stock. They started the review year, 2 months later, with 19 employees, increased to 35 by the end of the year. The company operated in 12,000 sq. ft. of space, in a building owned by the Balls; during the year a mezzanine was added, at economical cost.

Mr. Ball continued to do all the bidding, acted as design engineer and with the general manager, a Mr. William W. King, supervised all operations. Mr. King joined the company in 1966 as foreman, with little experience; he was trained by Mr. Ball. When the business was incorporated, he became vice-president.

The key to the success of the business was the abilities and energies of the three principals, particularly Mr. Ball's expertise and industry in bidding.

Mr. Ball, in earlier life a machinist and shop foreman, was a man of extraordinary abilities. He would file large numbers of bids daily, without obtaining quotations from possible subcontractors. Relying on his great expertise as to castings, borings and other processes, and their costs, and on a file of drawings which he kept, he would fill out and submit from 10 to 30 bids per day, approximately 6,000 in the year. He was low bidder in approximately 3 percent of his bids, and received awards in 1.5 percent.

After a bid was filed, Mr. Ball handled the pre-award surveys and, if plaintiff got the award, it sought out subcontractors, negotiated prices and placed orders with them, monitored and expedited their work and assisted them as necessary. The staff included a quality control manager, a manufacturing manager, two project engineers and several inspectors. The balance of the staff was employed in the production department.

Mrs. Ball handled financial affairs, office and paper work. She was in charge of payroll, billing, receipts and payments to subcontractors. She took care of insurance coverage, progress payment requests and presentations to the Small Busi-

ness Administration for certificates of competency. She negotiated settlements on terminations for convenience and established a materials control system. When necessary to meet a deadline, she helped out in the production department.

All three worked long hours, sometimes as much as 90 hours a week.

As might be expected in a business relying so heavily on subcontracting, capital and net worth were small in comparison to sales and profits. Opening net worth was $69,571, and opening capital was $212,793. Plaintiff invested additional capital during 1967 to the extent of only $57,385.

Efficiency

Section 103(e) (note 1, *supra*) directs that the efficiency of the contractor is to be considered,

> with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of materials, facilities, and manpower;

In amplification of the statutory language, the regulations of the Renegotiation Board refer to the meeting of production schedules, expansion and maximum use of facilities, rejection record, reported difficulties with the product, cost comparisons with other fiscal years and other contractors, decreases in controllable expenses and costs of materials, subcontracted items, number of employees in relation to production and reduction of waste. Regulations, Renegotiation Board, 32 CFR § 1460.9(b) (1974). Plaintiff did very well in almost all these areas.

Quality. Quality was very good. None of the goods shipped in the review year was rejected by Government field operations personnel. Only four first-articles submitted by plaintiff were rejected. A Government memorandum in evidence stated that plaintiff was cooperative, complied with requests and accepted suggestions of the Government's quality assurance representatives, overpacked rather than underpacked, and tried to maintain the highest quality standards. Defendant admits there were no problems with the quality of plaintiff's products.

Quantity. Volume was eminently satisfactory; plaintiff expanded its production from $105,000 in 1965 to an annual rate of $585,000 in the first half of 1966, to $2,600,000 in the review year, fiscal 1967.

Economy. Plaintiff was efficient in the use of space. It carried out its expanded production in 12,000 sq. ft. of space, enlarged during the year, economically, by the addition of a mezzanine. The roadwheel contract, utilizing 30 subcontractors and performed with praise from the Marine Corps, was distinguished by a highly efficient in-house final assembly line designed by plaintiff. Production was increased from a beginning of 10 to 80 per day. The work was done under two contracts. The first contract was bid at $577.50 per unit. On the second contract, plaintiff lowered its bid to $357, a distinct sign of economy with the benefits being passed on to the Government. Plaintiff was the low bidder in both contracts. One of the other bidders had previously manufactured the wheel and had in its possession the necessary tooling. The contracts were completed substantially on schedule.

Little scrap was produced in plaintiff's operations. When scrap appeared, occasionally, as a result of subcontracted work, plaintiff would rework it for use elsewhere.

Plaintiff was efficient, also, in the matter of personnel costs. The number of employees—an average of 27 during the year—was small in the light of the volume produced. Mr. Ball did all the bidding, supervised production and acted as design engineer (a design engineer was hired, in the following year, to relieve him). Mrs. Ball did all the financial work, was in charge of the office, and was not above packaging and working on the assembly line or driving a forklift when need arose.

Mr. Ball's ability to bid without obtaining quotations, one of plaintiff's greatest assets, was a distinct economy. Less experienced bidders, who obtained quotes before bidding, required numbers of assistants in the bidding department.

Plaintiff worked with great industry in small, efficiently managed quarters, with minimum overhead and a minimum staff, to produce a very substantial, increasing volume of

good quality goods, thereby displaying a high degree of efficiency of the kind contemplated by the Act,[2] for which plaintiff is entitled to much favorable consideration.

Subcontractor Utilization

The most prominent characteristic of plaintiff's method of doing business was the high degree of its utilization of subcontractors. This aspect of plaintiff's business, bearing on the factors of efficiency and character of business (and as will appear on other factors as well) warrants separate discussion.

After an award was received, plaintiff would as a matter of policy solicit quotations from at least three vendors for each subcontract. Before choosing a vendor with whom they had not dealt before, Mr. Ball or Mr. King would visit the shop to judge capability and facilities and pass on quoted prices and promised delivery. When quoted costs seemed too large or were greater than expected, plaintiff would solicit still further bids or suggest alternative, cheaper methods of production. Back-up vendors were usually maintained in case of a subcontractor's failure to perform.

Plaintiff used subcontractors throughout the United States. Most were small businesses; firms with less than 150 employees got $1.6 million or 80 percent of plaintiff's total purchases of $2 million.

The subcontractors were provided with active assistance in matters of material sources, in expediting promised deliveries and in engineering; assistance was given both at the subcontractor's plant and plaintiff's own plant. In some cases plaintiff supplied materials, in others it helped the subcontractor to develop its own sources. When it would appear that the costs of the work subcontracted were rising beyond expectation, plaintiff would suggest to a subcontractor alternate, more economical means of production.

[2] The regulations of the Renegotiation Board provide that (32 CFR § 1460.8 (a) (1974)):

"Contractors who sell at lower prices and produce at lower costs through good management, including conservation of manpower, facilities and materials, improved methods of production, close control of expenditures, and careful purchasing will receive a more favorable determination than those who do not. Such favorable or unfavorable determination will be reflected in the profits allowed to be retained by the contractor or subcontractor as nonexcessive."

Monitoring was closely done, by regular telephone calls and by visits to plants when it seemed necessary. During the year plaintiff bought an airplane with which to visit and inspect subcontractors. Records were kept on subcontractors' adherence to delivery schedules and quality control standards. When a subcontractor was short of money, plaintiff paid it promptly after work was done.

Despite plaintiff's excellent efforts in monitoring its subcontractors, it was plagued by delinquencies caused by the failure of subcontractors to make scheduled deliveries. Such delinquencies were a constant problem during the year, although they were reduced towards the end of the period. At one time plaintiff was, because of its late deliveries, on a list of "top problem contractors" kept by an Air Force office, but it was not on a second list of delinquencies on important contracts. Of the 181 contracts worked on, delivered or awarded in 1967, 113 or 62 percent were not completed by the original contract due date. Extensions were obtained in most of these, but plaintiff was late and required to pay a penalty in 38 cases or in 21 percent of the 181 contracts. The total of the penalties paid was $9,390.

Failures of subcontractors to make deliveries were during this period common and chronic. The flood of Government orders, many of them with priority over others, was doubtless the cause of many unfulfilled promises. In one case, Kaiser Aluminum, one of plaintiff's subcontractors, wrote to plaintiff concerning its lateness: "This is not unusual, as most of our orders are required before we can ship same."

There was no showing that the contracts on which plaintiff was late had high priority among other war contracts; there was no showing that other, similar contractors had better records in meeting delivery schedules. One of plaintiff's competitors was delinquent in 25 percent of its deliveries; in another 50 percent it had received extensions of time, and made delivery in the time as extended. That record is substantially similar to plaintiff's record.

In 1967 a contractor for small quantities of metal parts and pieces who delivered to military supply agencies good quality goods on extended delivery dates was probably doing as good a job was possible. The modest number and dollar amount

of the penalties assessed against plaintiff suggests that its delinquencies were not regarded as serious.

When delivery dates could not be controlled, plaintiff made extra in-house efforts on assembly line design. An incentive award program for its own employees, instituted during the year, was in part designed to compensate for late deliveries by subcontractors, by encouraging improvement in assembly and in-house processing time.

Plaintiff performed well, overall, in choosing and monitoring subcontractors. In the early portion of the year, its delivery record was less good, but energetic efforts apparently made improvement. Such delinquencies as took place, moreover, appear to have occurred despite constant efforts by plaintiff to choose, monitor and expedite subcontractors. Delinquencies were not shown to have been within the control of plaintiff, although plaintiff was of course contractually responsible for its late deliveries.

On the record overall, and especially considering the volume and quality produced, plaintiff is entitled to favorable consideration for its efficiency in effective utilization and monitoring a large network of subcontractors and in improving its performance in this regard during the year under review. The system of subcontracting enabled it to enlist and consolidate the efforts of specialists almost without regard to their location, whose gathering together under one roof would have required a heavily capitalized large enterprise. As a small prime contractor plaintiff by extensive subcontracting was able, without capital investment, to compete effectively against much larger, capital- and labor-intensive businesses with large overheads, and thereby successfully and profitably to perform contracts for a wide range of products.

The standard conditions in plaintiff's contracts with the Government called on plaintiff to "accomplish the maximum amount of subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this contract." The Renegotiation Board's regulations provide that "Defense production needs and the policy of Congress require that subcontracting, particulaly to small business concerns, be used to the maximum extent practi-

cable." Extensive such subcontracting receives favorable consideration. 32 CFR § 1460.14(b)(3)(i).[3]

Plaintiff is entitled to favorable consideration for its effective carrying out of the national policy of encouragement of subcontracting to small business, particularly in defense production. By marshalling the services of small business subcontractors over the whole country, plaintiff both contributed to the welfare of small business and brought resources into defense and war production "which might otherwise have been overlooked or passed by." 32 CFR 1460.14(b)(3)(ii), note 3, *supra*.

Amount of Profit: Reasonable Executive Compensation

One of the issues bearing on the amount of plaintiff's profits in 1967 to be examined for excessiveness is whether the compensation paid to the stockholder-principals, Mr. and Mrs. Ball, was excessive. To the extent the answer is in the affirmative, overhead was overstated and profit understated.

During 1967, the plaintiff paid Mr. Ball a total of $118,571 as compensation, Mrs. Ball $40,753 and Mr. King $53,499. In each case compensation was made up of salary, payments from a "Cost Savings Fund" and "incentive awards." The Cost Savings Fund was created by the board of the plain-

[3] 32 CFR § 1460.14(b)(3) (1974) provides as follows:

"(3)(i) Defense production needs and the policy of Congress require that subcontracting, particularly to small business concerns, be used to the maximum extent practicable. Although a contractor who subcontracts work may not reasonably expect to be allowed as large a profit thereon as if it had done the work itself, subcontracting of the kind described in this subparagraph, especially the extent to which subcontracts are placed with small business concerns, will be given favorable consideration in the renegotiation of the contractor.

(ii) A contractor will be given favorable treatment when, by subcontracting, it utilizes in the defense effort facilities and services, particularly of small business concerns, which might otherwise have been overlooked or passed by; when it has demonstrated its efficiency and ingenuity in finding appropriate opportunities for subcontracting; when the amount of subcontracting so accomplished is substantial; when the amount or complexity of technical, engineering and other assistance rendered by the contractor to the subcontractor is substantial; and when the price negotiated with the subcontractor is reasonable in view of the character of the components produced.

(iii) The portion of the renegotiable business of the contractor which is subcontracted will be a part of its total sales, and separate consideration must be given in applying to this portion the factors of risks assumed, capital employed, and reasonableness of costs and profits.

(iv) The subcontractor, of course, will receive favorable consideration in renegotiation for the successful employment of its own facilities and production skill."

tiff corporation to reward officers for their efficiency in reducing overhead, presumably controllable by the officers. The payments denominated "incentive awards" were voted by the board to all employees to promote morale and reward efficient performance.

The Fund and the system of awards are somewhat inconclusively criticized by the Government for their theory, basis and administration. There is no proof that either Fund or award system was fraudulent or a sham. Since, however, all the payments were in the last analysis made by Mr. and Mrs. Ball, the two owners of the company, to themselves, an issue remains as to whether the total was excessive or unreasonable as compensation—whether any part is to be regarded as a dividend or distribution of profit.

The Renegotiation Act provides that the cost to be deducted from gross renegotiable receipts to arrive at profits are those "estimated to be allowed" as deductions and exclusions under the Internal Revenue Code. § 103(f), 50 U.S.C. App. § 1213(f). The rule of decision for the issue of reasonable compensation is therefore the same as in tax cases under Internal Revenue Code, § 162(a)(1), namely, that "reasonable and true compensation," to be determined on all the facts, no one of which is controlling, is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances. I.R.C. 1954, § 162(a)(1), Treas. Reg. § 1.162–7(b)(3), 1958–1 CUM. BULL. 63–70; *Giles Industries, Inc.* v. *United States*, 204 Ct. Cl. 202, 496 F. 2d 556 (1974); *Charles McCandless Tile Service* v. *United States*, 191 Ct. Cl. 108, 422 F. 2d 1336 (1970); *Griffin & Co.* v. *United States*, 182 Ct. Cl. 436, 389 F. 2d 802 (1968).

The Government relies on the treatment by the Internal Revenue Service of the income tax return of plaintiff for 1967. On the audit by the Service, $107,324 of the total compensation paid to Mr. and Mrs. Ball was disallowed, adjustment was made and a deficiency letter went out to plaintiff. The record is silent as to any contest and it is to be presumed that the deficiency was paid. The deficiency letter stated that reasonable compensation for Mr. Ball was $40,000, and for Mrs. Ball $12,000, a total of $52,000 or $107,324 less than the sum actually paid. Because, urges the Government, the determina-

tions of the Commissioner are presumptively correct, plaintiff has the burden of proving otherwise than that reasonable compensation for the two was $52,000.

The "presumption" in favor of the determinations of the Commissioner of Internal Revenue, frequently referred to in tax refund cases, is an expression of the character of the suit as one for money had and received, in which the plaintiff must establish by a preponderance of the evidence that he has overpaid his taxes and is entitled to a money judgment. *Missouri Pacific RR* v. *United States*, 168 Ct. Cl. 86, 338 F. 2d 668 (1964); *Eli Lilly & Co.* v. *United States*, 178 Ct. Cl. 666, 677, 372 F. 2d 990, 997 (1967). The presumption is thus not transferable, as a rule of evidence might be, to suits of a different character, especially to a renegotiation case, where the hearing is de novo and the burden of proof is on the defendant, the Government. *Lykes Bros. SS* v. *United States*, 198 Ct. Cl. 312, 459 F. 2d 1393 (1972).

The regulations of the Renegotiation Board provide that the Board will exercise a judgment independent of the action of revenue agents as to what items are allowable as deductions or exclusions under the Internal Revenue Code. 32 CFR § 1459.1(b)(4) (1974). The Renegotiation Act of 1943 provided for the deduction from gross profit of deductions estimated to be "allowable"; the present Act substituted "allowed" for "allowable." Section 403(a)(4)(B), Act of 1943, 58 Stat. 78, 79, 50 U.S.C. App. § 1191(a)(4)(B) (1970); § 103, Act of 1951, 50 U.S.C. App. § 1213(f). Yet the Tax Court in construing the 1943 Act did not feel itself bound by a determination by the Commissioner of Internal Revenue. *Marie & Alex Manoogian Fund* v. *Renegotiation Board*, 24 T.C. 412, 415 (1955), *app. dismissed*, 232 F. 2d 758 (C.A. 6), *cert. denied*, 352 U.S. 929 (1956); *Puget Sound Machinery Depot* v. *Land et al.*, 17 P-H Tax Ct. Mem. 617, 630, 4 CCF ¶ 60,535, at p. 50,927 (1948); *Eastern Machinery Co.* v. *Under Secretary of War*, 12 T.C. 71, 74 (1949), *aff'd.* 182 F. 2d 99 (D.C.C.A. 1950) (1943 Act). The burden of proving the Commissioner's conclusions to be correct is, therefore, on the Government, with the burden as to the entire case.

Plaintiff has, however, the burden of going forward as to the accuracy of the financial data going to the amount of his

profits. *Lykes Bros. SS* v. *United States*, *supra*, 198 Ct. Cl. at 326, 459 F. 2d at 1401. Final persuasion on the reasonableness of compensation is necessarily influenced, also, by the circumstance of the large proportion of claimed overhead—$159,324 of $348,298—paid to the two executives who were the sole stockholders. No disinterested or economy-minded stockholders here stood ready to scrutinize officer compensation. In consequence, the payments to sole stockholder-executives are "subject to close scrutiny" in order to insure that salaries and bonuses are not being used as a vehicle for siphoning off otherwise taxable, or renegotiable, profits. *Boyd Constr. Co.* v. *United States*, 168 Ct. Cl. 579, 586, 339 F. 2d 620, 624 (1964); *Bringwald, Inc.* v. *United States*, 167 Ct. Cl. 341, 334 F. 2d 639 (1964); 4A Mertens, LAW OF FEDERAL INCOME TAXATION (Rev. 1972) § 25.81.

The evidence includes these data: (1) an audit for a part of the year under review by an auditor with the Defense Contract Audit Agency which, converted to a whole year, gives a total reasonable annual compensation for the year for Mr. and Mrs. Ball of $52,000; (2) the Commissioner's determination and the results of the I.R.S. audit, to the same effect as the DCAA audit; (3) that an average of $32,000, with a range of $22,000 to $42,000, was in 1967 paid to executives as compensation by companies in the "fabricated metal products industry" with sales in the $2.5 million range; (4) that in 1967 executive compensation in the metal fabrication industry by companies with $1–5 million in assets was 2.6 percent of total sales, whereas plaintiff's officers were paid $212,823 or 8.2 percent of total sales of $2,599,060; (5) testimony of two witnesses from the industry; one testified to Mr. Ball's merits and estimated his worth at $100,000 a year and the other testified that principals in a somewhat comparable business were, with the approval of the I.R.S., paid a total of $81,250 each in salary and I.R.S.-approved pension and profit sharing plans.

I give relatively little weight to the audits—both reaching the same result—by the DCAA and the I.R.S. The I.R.S. auditor did not testify, and the plaintiff's failure to challenge the Commissioner's determination and the payment of the deficiency of $101,808 is not, realistically, an admis-

sion of very great materiality, for it may have been motivated by other considerations than a recognition of the accuracy of the determination. *Cf. Eastern Machinery Co.* v. *Under Secretary of War*, *supra*, 12 T.C. at 74. The DCAA auditor, who did testify, seemed to me to have colored his conclusions by some assumptions as to the non-competitive conditions in plaintiff's industry and by an insufficient consideration of the long hours worked by Mr. and Mrs. Ball.

The statistics in the record on salaries paid executives in comparable industry have only limited applicability. Mr. Ball was a very special executive, and cannot be compared to the ordinary, more or less fungible executive.

Mr. Ball was the brain and driving force of the whole business. His skills and devoted efforts in bidding, finding, assisting and monitoring of subcontractors and in designing and supervising final in-house assembly or parts produced by numbers of subcontractors were the largest part of the efforts responsible for plaintiff's operations and success. With almost no capital, plaintiff's 27 employees, led by Mr. Ball, accomplished sales of $21½ million.

It is noteworthy, too, that no serious challenge is made to the $53,000 salary of Mr. King, vice president and Mr. Ball's assistant. The reduction of Mr. Ball's salary to $40,000, as the Government urges, would leave him paid less than the assistant whom he trained.

It seems obvious that substantial adjustment is necessary before the average salary paid to executives in comparable industry—even among high-paying companies in that industry—may be used to measure the amount reasonably payable for Mr. Ball's services. *Giles Industries, Inc.* v. *United States*, *supra*, 204 Ct. Cl. at 214–15, 496 F. 2d at 563–64; *Northlich, Stolley, Inc.* v. *United States*, 177 Ct. Cl. 435, 444, 368 F. 2d 272, 278 (1966); *R. J. Reynolds Tobacco Co.* v. *United States*, 138 Ct. Cl. 1, 14, 149 F. Supp. 889, 897, *cert. denied*, 355 U.S. 893 (1957).

The testimony of the two industry witnesses is directly material on the question of appropriate compensation for Mr. Ball. One of these witnesses, a Mr. Robert Carter, was, in 1967, a chief executive of a neighboring business, also engaged in Government contracting; by the time of trial he was the

head of a division of a large industrial concern in Cadillac, Michigan. He confirmed the long hours worked by Mr. and Mrs. Ball and compared his Government-contract bidding efforts with those of Mr. Ball. He had four assistants, each paid about $10,000 a year, whose job it was to get quotations on the elements of the bids they filed. Together he and his assistants were able to file only two or three bids per day as compared to Mr. Ball's 10 to 30. In his judgment, Mr. Ball was worth $100,000 a year.

The second witness, a Mr. William Hoffberg, was a principal in a company engaged in a business similar to plaintiff—characterized by high subcontractor utilization in performing fixed-price Government contracts comparable to plaintiff's contracts, submission of bids without obtaining vendor quotes, comparable space-utilization and volume of sales, but with more employees. This company was in 1967 managed by three persons, two of them co-owners, one of the co-owners being the witness. The three each worked an average of 60 hours per week.

The two co-owners each were paid a base salary of $75,000, plus 25 percent thereof to an I.R.S.-approved pension and profit sharing plan, a total of $93,750 for each. The third officer, the co-owners' assistant, was paid a salary of $40,000, plus a contribution of $10,000 to the pension and profit sharing plans, a total of $50,000.

The Internal Revenue Service in its audit of this company for 1967 disallowed, as unreasonable compensation, a total of $12,500 for each of the two co-owners, thereby allowing approximately $81,250 as compensation for each of the two co-owner principals. The total allowed as reasonable compensation for the three officers was $212,500.

While the compensation paid in the metal fabrication industry offers little or no help in the determination of how much Mr. Ball was worth, the situation is somewhat different for Mrs. Ball, who is much more than her husband comparable to the "average" executive. Her relatively low rank of secretary is balanced out by her varied contributions and her devotion to the business.

On all the evidence, my conclusion is that reasonable compensation for 1967 for Mr. Ball was $75,000 and for Mrs.

Ball $25,000. These conclusions are based primarily on the evidence, throughout the record, of the skills, accomplishments and devotion of Mr. and Mrs. Ball, on the testimony of the two industry witnesses and, as to Mrs. Ball, on the industry figures as well.

The compensation so allowed for Mr. and Mrs. Ball, a total of $100,000, is $59,324 less than the sum paid them, and, as noted above, the sum of $59,324 has been deducted from overhead and added to the profits of plaintiff in the review year.

Amount of Profit: Inventory Valuation

A second issue as to the amount of plaintiff's profits in 1967 is raised by defendant's contention that plaintiff's claimed year-end inventory of $503,441 was undervalued by $134,304 and thus that profits should be increased by that amount.

The work-in-process inventory system established for plaintiff by its outside accountant was based on the cost cards kept by plaintiff for each job. The costs of material and labor for the job were recorded as they were incurred and at intervals, usually monthly, the accountant added to the cards 20 percent of the costs shown, in order that each job should reflect its share, albeit an arbitrarily determined share, of overhead. It was not intended, however, that the valuation of inventory should include overhead, and when, therefore, a work-in-process inventory figure was needed, the total on the cards was reduced by 20 percent in order to remove the overhead charge.

The reduction by 20 percent was criticized by an expert witness for the Government as an over-reduction by 4 percent; when material and labor costs of, say, $100 were increased by 20 percent to $120, a reduction of the $120 by 20 percent reduced the total by $24, $4 more than 20 percent of $100.

Further, the inventory valuation method in use by plaintiff took account of partial or full shipment of finished goods by reducing the total on the cost cards by 80 percent of the sales price of the goods shipped. The assumption here was that 20 percent of sales price was profit and 80 percent the cost/value of goods sold. The reduction of cost-card totals

by 80 percent would thus remove from the cost/value of work in process the cost of goods which had been shipped.

The use of a generalized 80 percent reduction was criticized by the Government's expert on the ground that in some cases the 80 percent reduction left cards with a credit or minus balance, which would mean that the value of the remaining work in process was "less than nothing." There were also other, lesser criticisms of the evaluation process—of write-downs for losses and of the treatment of progress payments.

At the trial, plaintiff's accountant, as a witness for plaintiff, recalculated the work-in-process inventory as of the end of the review year, without the use of the criticized percentage additions and reductions, with no inventory write-downs and with none of the other challenged entries. The witness, a certified public accountant, took the total direct costs of the jobs still in process as of August 31, 1967, and deducted the percentage thereof equal to the proportion of the total goods which had been shipped. The resulting valuation—of the costs of materials and labor expended for inventory of goods not shipped and still in process at the end of the year—came to $513,257.85. With two adjustments required for reasons not here important, this post-facto valuation became $508,685, only $5,244 or about 1 percent more than the $503,441 shown on plaintiff's books.

This recalculation demonstrates that the accounting method actually used to calculate inventory, simple and imprecise as it may have been, produced a reasonably correct reflection of actual values. The method was appropriate to the needs of the small business involved. The challenge to the inventory valuation on plaintiff's books is rejected.

Extent of Risk Assumed

Consideration is under section 103(e) of the Act (note 1, *supra*) also to be given, in the determination of excessive profits, to the

> (3) Extent of risk assumed, including the risk incident to reasonable pricing policies;

An essential quality of the firm, fixed-price contract is that the contractor assumes responsibility for his costs, with the inevitable risk that greater costs will be incurred than were

anticipated, and that the contract will result in loss rather than profit. *Boeing Co.* v. *Renegotiation Board*, 37 T.C. 613, 643 (1962), *app. dismissed*, 325 F. 2d 885 (C.A. 9 1963), *cert. denied*, 377 U.S. 923 (1964). "Acceptance of contracts without escalation or similar protection may involve a risk that the cost of labor or materials may increase." 32 CFR § 1460.12(b)(1) (1974). Among all the kinds of contracts made by the Government, the firm, fixed-price contract, "not subject to any adjustment by reason of the cost experience of the contractor, in the performance of the contract," places "maximum risk upon the contractor" and "imposes a minimum administrative burden on the contracting parties." ASPR 3-404.2(a), 32 CFR § 3.404-2(a) (1974). The risk is intensified during the shortages which accompany war.

The competitive state of the market (discussed under another factor, below) in which the risk of fixed-price obligations has been assumed may affect the price and thus the risk. Nevertheless where, as in this case, all the business of a contractor is done under firm, fixed-price, competitively bid contracts, he has obviously gone a good distance towards a showing of the assumption of substantial pricing risks of the sort for which favorable consideration should be given. Moreover, plaintiff got little special treatment by "special source" advertisements, "set-aside" quantities limited to small business, or from the failure or omissions of other, lower bidders.

Subject to what is said, below, on the competitive state of the market at the time, plaintiff's pricing and bidding policy was one of close pricing, in the interest of getting the award. A prime example is the revision of its bid price downward, from $577 in the first to $357 in the second contract for the roadwheel assemblies for the Marine Corps. For such revision of prices downward, a contractor is entitled to special consideration.[4]

[4] 32 CFR § 1460.12(b)(2) provides that:

"The risk assumed by the contractor as a result of its pricing policy will be given particular consideration. A contractor, having initial prices calculated to yield a reasonable profit, who revises such initial prices downward periodically when circumstances warrant, will be given more favorable treatment under this factor than a contractor who does not follow such policy. In order that proper consideration may be given, it is suggested that contractors, when making such periodic price revisions, notify the Board of the action taken in this respect."

All of plaintiff's business was not only firm, fixed-price work, but all of it was, also, heavily dependent on subcontractors. The degree of use of subcontractors, already discussed for its bearing on character of business and efficiency, has meaning, too, in the consideration of risks assumed. *See* 32 CFR § 1460.14(b) (3) (iii) (1974). No separation of plaintiff's business as between subcontracted and nonsubcontracted part is possible; all of it was permeated with whatever risks are created by the use of subcontractors. Plaintiff's entire business, therefore, must be regarded as affected—favorably or unfavorably—by its involvement with subcontracting.

The Government contractor who subcontracts extensively is, at least in wartime, between two powerful forces, neither of whom bend easily to his will. On the one hand there is the Government, to which the prime contractor is bound by contract; on the other there are the subcontractors, for whom the prime contractor is guarantor, any of whom may cause a default in the primary obligation to the Government.

Almost all of plaintiff's work took place under standard Government contracts which contain clauses, not negotiable by the bidder, imposing rigorous obligations aside from any fixed-price obligation. E. J. Stone, CONTRACT BY REGULATION, 29 Law & Contemp. Prob. 32, *passim* (1964). The Government may under a frequent clause buy less than the quantity bid on, at bid unit prices, unless the bidder specifies otherwise. In one case plaintiff bid on 4,052 fittings, for which tooling would cost $1,800. The Government ordered 288 fittings, for a total of $538.56. Under another clause, the Government may buy up a specified quantity more than the contract amount, at the same unit price; in some cases, the Government ordered extra amounts from plaintiff under this "add-on" clause.

There is more flexibility in commercial work than in Government supply as to prices, delivery dates and other contract provisions; some companies prefer not to do Government fixed-price prime-contract work and some even decline it. Substitutions or departures from specifications are not permitted under the Government contract, at least not without burdensome applications which must commend themselves to the approval of the officers of the Government's

procurement system. Drawings are sometime old, incomplete, inconsistent and ambiguous. While extensions of time and extra payment are available if there is Government fault in the drawings, errors in interpretation of drawings are not the fault of the Government. Such errors are common, and occurred in plaintiff's work during the review year. A miscalculation in a bid, a botched job by an engineer, a misread specification—any of these all too possible events may mean no profit or worse. Plaintiff suffered such mishaps in the year under review.

Dangers are particularly present when bidding on a product for the first time. Every item bid on with which the bidder has little or no familiarity, either as to manufacturing process or bid history, presents a threat of loss. "Contractors may guarantee quality and performance of the product notwithstanding uncertainties as to the quality obtainable from their plants, particularly with respect to products which may be more or less abnormal to them." 32 CFR § 1460.12(b)(1) (1974).

In a large (and on the record not precisely determinable) part of its work, plaintiff was bidding on items it had not made before. A loss in a substantial contract for an item of this kind can dissipate profits for the whole year. For example, in 1969 plaintiff bid successfully on a Government contract for a decontaminating apparatus. Unanticipated difficulties were encountered in production, additional costs were incurred, and plaintiff suffered a loss which caused an operating loss for the year of $260,000 on renegotiable business, while nonrenegotiable business showed a 27 percent profit. Other manufacturers, too, suffered losses the first time they produced the unit. The setting for the loss—the unit was large, contained many parts and had not been earlier produced by plaintiff—could just as well have applied to the roadwheel assemblies which accounted for a third of plaintiff's total sales for the year 1967.

Among the more burdensome obligations in the Government contract is that of the contract delivery date, buttressed by threat of termination for default, liability for excess procurement costs and, often, liquidated damages. "Contractors may assume risks by guaranteeing delivery schedules not-

withstanding possible inability to obtain needed materials or labor." 32 CFR § 1460.12(b)(1) (1974). A frequent misfortune of the prime contractor who is heavily dependent on numbers of subcontractors, is delivery later than the due date. Any delay in the shop of one of the subcontractors may upset the contract timetable for the movement of the parts, pieces and assemblies through the necessary sequence of subcontractors towards assembly of the final product.

Having assumed contract obligation as to fixed-price, specifications and delivery date, the prime contractor assumes the risk of his subcontractors' failure to perform. "Contractors who subcontract work, the performance of which they guarantee, in general assume a greater risk than contractors who retain performance entirely within their control." 32 CFR § 1460.12(b)(1)(1974). The risks are multiplied when a contractor uses numbers of subcontractors who are in sequence to perform interlocking operations on one product. The parts and pieces and assemblies of parts must not only move along on schedule but they must also be well made, in compliance with specifications. The small subcontractor typically does not accept responsibility for the consequences of his delays and other faults, leaving the prime contractor to face the consequences, the least of which may be the necessity of applying for an extension of time, to be granted only on condition of a money payment.

Subcontractors limit their liability for defective work; some, for example foundries and machinists, will not accept liability for the costs in the onward process attributable to defects in their work. One of plaintiff's simple jobs, a bomb lug or hanger, resulted in a 50 percent loss when porosity and hard spots were encountered in the castings. Plaintiff's subcontractor supplied new castings, but increased the costs of machining, which had to be paid by plaintiff. Defects may occur in any casting; there was a risk of hard spots in castings for many of plaintiff's contracts during the review year, including the two Marine Corps roadwheel contracts.

Unexpected rises in costs are another common hazard for those who extensively use small subcontractors. Plaintiff's subcontractors in the main operated with price escalation clauses in their favor. Sixty percent of the value of plain-

tiff's purchases in 1967 ($1.2 million of $2,088,000) were made under contracts containing such clauses. Many subcontractors reserved the right to ship 10 percent more or less than the quantity ordered. Some wanted earlier payment than agreed; good business required that plaintiff pay.

When the conditions of the work do not suit a subcontractor, he will refuse to do the job. Such an episode accounted for the single instance in which a contract held by plaintiff was terminated for default during the review year. A subcontractor took exception to onerous contract provisions and refused to do the work. Plaintiff was unable to locate another, defaulted and was required to reimburse the Government for additional reprocurement costs, in the amount of $2,224.71, about 20 percent of the amount of the contract.

The contract price is the prime contractor's compensation. And of course not all of the risks of loss eventuate, or if they occur, do not cause a substantial loss. Nevertheless, the plaintiff's experience shows that the risks described above were neither speculative nor unlikely. 32 CFR § 1460.-12(b)(1) (1974).[5] *B-E-C-K McLaughlin & Associates* v. *Renegotiation Board*, 38 P-H Mem. T.C. Mem 1969-15, ¶ 69,105, 13 CCF ¶ 82,481 (1969), *aff'd* 443 F. 2d 1180 (C.A. 9 1971). Prosperous as plaintiff was in 1967, its profits went down to $143,000 in the next fiscal year, 1968. It suffered a loss of $260,000 in 1969, and it made profits of only $20,000 in 1970, though the nature of its business remained the same (except that its space increased and its employees increased in number). This evidence of plaintiff's modest profits and even losses in years shortly following 1967 confirms that the business of plaintiff was highly risky. 32 CFR § 1460.12 (b)(1), note 5, *supra*.

The risks inherent in the plaintiff's system of subcontracting increased, moreover, as the Government's demand rose. With each successive contract, the volume of goods moving

[5] "In general, the [Renegotiation] Board will consider whether the contractor's performance of renegotiable business is free from risk, or subject to it, on the basis of actual experience and not mere speculative or unlikely possibilities. The Board will give special consideration to evidence showing risks through actual realization of losses incurred by the contractor in performing contracts in other years similar to the contracts undergoing renegotiation, and losses incurred in the same or other years by concerns other than the contractor, especially when connected with the contractor in any way, and in performing similar contracts." 32 CFR § 1460.12(b) (1974)

from one processing shop to another increased, and the network of subcontractors increased. With this increase, plaintiff's monitoring and overseeing job grew more difficult, and the risk steadily increased that a marginal or an overbusy subcontractor would fail to produce the quality and volume needed, or in the time specified. In a word, the greater the Government's demand, the greater the volume of sales, the greater, for plaintiff, the risks assumed. This increase of risk is to be given effect in the consideration of the reasonableness of plaintiff's profits from the increased demand of the Government, in 1967, a time of war.[6]

The conclusion must be that the undertaking by plaintiff to produce what it did, at firm, fixed prices, by the large-scale use of subcontractors, in 1967, in time of war, as the Government's procurement was on the rapid increase, was a commitment with very substantial economic risks. Risks permeated plaintiff's entire business, and plaintiff is entitled to highly favorable consideration under the risk factor.

Contribution to the Defense Effort

The statutory factor of "nature and extent of contribution to the defense effort" includes "inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance." Section 103(e)(4), note 1, *supra.*

Plaintiff contributed none of the "experimental work," "new inventions" and the like which are usually thought of as a contribution to the war effort. 32 CFR § 1460.13(b)(1974). But plaintiff nevertheless made a real contribution in producing an abundance of high quality goods needed for the prosecution of a war, by the skillful and energetic marshalling of the efforts of small subcontractors all over the country, who "might otherwise have been overlooked or passed by." (32 CFR § 1460.14(b)(3)(ii) (1974), note 3, *supra.*) This was surely an "unusual contribution" or "performance, assistance or service otherwise exceptional"

[6] The Renegotiation Board regulations dealing with the sharing as between contractor and Government of the profits flowing from increased demand by the Government, refer to "added risk assumed" by the contractor as warranting a larger portion for the contractor. 32 CFR § 1460.10(b)(3) (1974).

qualifying as a contribution to the defense effort deserving of favorable consideration in the determination of reasonable profits under the Act. 32 CFR § 1460.13(b) (1967); 32 CFR § 1460.13(b) (1974); *Boeing Co.* v. *Renegotiation Board*, *supra*, 37 T.C. at 645.

Net Worth

Section 103(e), note 1, *supra*, requires consideration, also, of

> (2) The net worth, with particular regard to the amount and source of public and private capital employed;

Plaintiff's capital in the year 1967 was $212,793. Opening net worth was $69,571 and closing net worth was $284,704.87. Plaintiff invested, during the year, $57,385 in an airplane.

Plaintiff also received progress payments, during the year under review, in the amount of $973,624. Such progress payments are held to mean that the contractor is not entitled, as an element of its profit, to sums designed to compensate for the costs of financing working capital. *LTV Aerospace Corp.* v. *Renegotiation Board*, 51 T.C. 369, 406 (1968); *cf. Aerojet-General Corp.*, ASBCA No. 17171, BCA 74-2, ¶10,863. When Mr. Ball bid on a contract providing for progress payments, however, he did not include in his bid an item for interest.

Plaintiff's renegotiable profits of $478,297 are plainly an exceedingly high return on capital and net worth and would be patently excessive [7] if the basis for the determination of

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[7] The regulations of the Renegotiation Board provide (32 CFR § 1460.11 (b)(4) (1974)):

"(4) The relationship of profit realized on renegotiable business to the capital and net worth employed in renegotiable business will be used as one of the considerations in the final determination of what constitutes excessive profits.

"A contractor who is not dependent upon Government or customer financing of any type is entitled to more favorable consideration than a contractor who is largely dependent upon these sources of capital. When a large part of the capital employed is supplied by the Government or by customers, the contractor's contribution tends to become one of management only and the profit will be considered accordingly."

See also *Operations and Activities of the Renegotiation Board*, REPORT OF THE COMPTROLLER GENERAL TO CONGRESS NO. B-163520, May 9, 1973, 35-36; *cf. Efficiency and Effectiveness of Renegotiation Board Operations, Report of the House Committee on Government Operations*, H.R. Rep. 92-758, 92d Cong., 1st Sess. (1971) 14.

reasonable profits were to be the return on capital or net worth employed. Plaintiff's business is not, however, a capital-intensive business, but rather one involving mainly management and productive skills devoted to the organization of the capital resources of others, its subcontractors. *Cf.* 32 CFR § 1460.11(4) (1974), note 7, *supra.* The return on the capital invested is therefore not an appropriate measure for the reasonableness of plaintiff's profits, witness that the Government itself is contending for a determination of excessiveness (and a total profit) which would allow plaintiff a 254 percent return on net work. It would be as unfair to judge the reasonableness of plaintiff's profits by a "normal" rate of return on capital invested or on net worth as it would be to use that standard in passing on the reasonableness of the profits of such plainly service businesses as a testing laboratory, a geological prospecting firm or a law firm. *Cf. X-Ray, Inc.* v. *Renegotiation Board*, 28 P-H Tax Ct. Mem. 459, 7 CCF ¶ 71,117 (1959).

In sum, the small amount of capital or net worth, here, is not a criterion for the judgment on excessiveness, except insofar as the amount of plaintiff's capital and net worth are no support for the retention by plaintiff of anything like the profits it actually made.

Reasonableness of Plaintiff's Costs and Profits

Plaintiff's sales, costs and profits in 1967, the year under review, were as follows:

	Total	*Nonrenegotiable**	*Renegotiable**
Net Sales	$2,599,060	$16,118 or 0.62%	$2,582,942 or 99.38%
Direct Costs	(1,828,805)	*(11,339)	*(1,817,466)
Overhead (claimed overhead of $348,298, less $59,324, disallowed as compensation)	(288,974)	*(1,792)	*(287,182)
Net Profit	481,281	*2,984	*478,297
Profit as percent of Sales	18.5%	18.5%	18.5%

*The allocation of costs, overhead and profits as between nonrenegotiable and renegotiable elements is on the basis of the percentage of each type of sales, 0.62 percent nonrenegotiable and 99.38 percent renegotiable.

Sales and profits prior to 1967, to plaintiff's beginnings in 1965, were as follows:

	Sales	*Profits*	*Profits as a percent of sales*
Prior to incorporation, without provision for compensation to proprietors:			
1965	$104, 968. 65	$13, 834. 25	13. 18%
1966 (first 6 mths.)	292, 433. 38	89, 883. 50	30. 74%
Following incorporation and with provision for executive compensation:			
July-August 1966	153, 720. 45	25, 125. 52	16. 34%

Sales and profits have decreased in the years since 1967, as follows, though the nature of plaintiff's business has remained substantially unchanged, except that the space it occupies has been increased substantially and the number of employees has gone up substantially:

Fiscal Year	*Sales*	*Profit or (Loss) per Plaintiff's Books*	*Profit or (Loss) per I.R.S. Audits*
1968	$1, 977, 384	$88, 276	$143, 267
1969	1, 621, 393	(265, 606)	(218, 005)
1970	1, 246, 337	1, 658	20, 318
1971	1, 404, 617	85, 410	
1972	1, 791, 111	160, 353	

The Act directs that the "reasonableness of costs and profits" shall be considered "with particular regard to volume of production, normal earnings, and comparison of war and peacetime products." Section 103(e)(1), note 1, *supra.*

Unfortunately, plaintiff had no "normal" earnings and no "peacetime products" sufficient for useful assessment under this factor. Plaintiff's whole existence, prior to the year under review, was brief. In the year 1965 plaintiff was just beginning in business. The first 8 months of 1966, before the start of the fiscal year now under review, was a period of rapidly rising but still small sales of $466,153, too short a period and too small a total on which to base comparisons. Profit figures for 6 of the 8 months, the period prior to incorporation in June 1966, moreover, made no provision for compensation to proprietors. The statutory references to "normal earnings" and a comparison with "peacetime products" is therefore, as the Government and plaintiff seem to agree, not here possible of application, and no historical base is available by which to measure plaintiff's profits in 1967.

It has not been contended that plaintiff's profits and losses in the post-1967 years might be considered its "normal" earnings or that its products in those years might be considered "peace time." Aside from any question as to whether the statutory language looks only backward in time,[8] the record would not support any theory that the post-1967 years were normal.

The Act contemplates determinations of profits for excessiveness on a year by year basis, without offset or adjustment of profits by reason of losses in years other than the year under review; explicit, limited exceptions are made for loss carryforwards. Sections 103(f), 103(m), 105(a), 50 U.S.C. App. §§ 1213(f), 1213(m), 1215(a) (1970); *see* 32 CFR §§ 1457.1, 1457.8, 1457.9, 1459.5, 1460.2(d), 1460.10(b)(1) (1974). The data on profits and losses in the years following 1967 are therefore of little relevance on the reasonableness of plaintiff's profits in 1967, although as noted above they have relevance to the risks assumed by plaintiff.

The statutory subfactor remaining for application is "volume of production." Section 103(e), note 1, *supra*. If by this is meant absolute volume, rather than relative volume of war and peacetime production, then certainly plaintiff scores well. It produced, for its size, mightily. In the first 6 months of 1966 its production was under $50,000 monthly, in the next 2 months slightly over $75,000 monthly, and in the next year, the year under review, over $215,000. The regulations of the Renegotiation Board state that: "Favorable consideration will be given to an increase in volume of production for defense purposes." 32 CFR § 1460.10(b)(3) (1974).

Profits from increases in volume of production to meet increased Government demand, however, may under certain circumstances be required to be shared with the Government. This principle is stated in the regulations of the Board in the same breath as the provision just quoted

[8] The first full-scale Renegotiation Act, the Revenue Act of 1943, used the phrase "normal pre-war earnings." Section 403(a)(4)(A), ch. 63, 58 Stat. 78, 79, 50 U.S.C. App. § 1191(a)(4)(A) (1970). In the reenactment of 1951, reference to "pre-war" earnings was presumably deemed inappropriate and the phrase was shortened, in present section 103(e) (note 1, *supra*) to "normal earnings."

promising favorable consideration for an increase in volume of defense productions (*ibid.*):

> (3) Favorable consideration will be given to an increase in volume of production for defense purposes. On the other hand, when the Government's demand has enabled the contractor to increase his sales without exceptional effort and without corresponding increases in costs, decreased unit costs result, and the Government should normally get the principal benefit in more favorable prices, or in renegotiation. In many cases, the contractor may establish that factors related to the increased volume, such as developmental contribution, added risk assumed, or added investment of capital, entitle the contractor to claim a larger share of the benefit resulting from increased volume, but to the extent that this is not shown, the margin of profit on expanded renegotiable sales should be adjusted in reasonable relationship to the expanded volume. Increase in volume made possible by increased subcontracting may often not involve any cost savings, and will involve problems discussed under other factors. See §§ 1460.12 and 1460.14.

Invoking the principle underlying the foregoing regulation, the Government maintains that plaintiff's profits were the result, not of plaintiff's merits, but of the greatly expanded volume of military procurement in 1967 for the war in Southeast Asia and a concomitant falling off in competition. The Government contends that plaintiff's profits of $666,850 are excessive by $490,000, leaving plaintiff with adjusted sales of $2,092,942 ($2,582,942−$490,000=$2,092,942) and reasonable profits of $176,850 ($666,850−$490,000=$176,850), a ratio of profits to sales of 8.5 percent ($176,850 divided by $2,092,942=8.5). A ratio of profits to sales of 8.5 percent is said to be more than the average percentage in industries similar to plaintiff's business, as follows:

	Percent of Net Profits to Sales
Manufacturers of "Miscellaneous machinery, except electrical" per *Dun & Bradstreet's Annual Survey*, "Ratios of Manufacturing for 1967"	4.38–14.58
Fabricators of wire products and miscellaneous fabricated metal products with assets of $1–5 million, per I.R.S. *Corporation Source Book of Statistics of Income, 1967*	8.4
F.T.C.-S.E.C. *Financial Report of Manufacturing Corporations*, 4th Quarter 1967:	
Metal working machinery and equipment	9.4–11.0
Other fabricated metal products manufacturers	7.4–8.7

The Government further urges that Mr. Ball unthinkingly made bids at random, some of them falling in by reason of the expansion in procurement for the Vietnam war; on this theory, it is said, plaintiff's 1967 profits were undeserved, a windfall, and should be greatly reduced. A Government witness theorized that a contractor might "pump out" bids without supporting quotes and then by one method or another "wriggle out" of unprofitable awards, either at the pre-award survey or by use of the certificate of competency procedure of the Small Business Administration. Facts showing that plaintiff did this were completely lacking.

The contention that procurement for the Vietnam war caused a decline in competition in 1967, is not, however, so readily to be dismissed. The year under review was a period of greatly increased military procurement for the war in Southeast Asia, and the expansion in procurement was doubtless a "but for" cause of a substantial part of the increase in plaintiff's total sales in this period.

With the increase in Government procurement for war it was inevitable that there would be fewer bids or bids at higher prices by contractors already busy to capacity and beset by wartime scarcities of labor, materials and shop capacity. As procurement expanded, competition waned and prices and margins of profit necessarily rose. Profits from this source are the objective of the Renegotiation Act, which is aimed at profiteering and is intended to recoup the unreasonable, excessive portion of the profits from war and defense production, without deterring the efficient and voluminous production of the goods needed for defense and war. *Lichter* v. *United States*, 334 U.S. 742 (1948) *passim* and at 760n. 6.

Plaintiff's 1967 profits were in part the product of the decline in competition by reason of the Government's expanded program for the procurement of war goods, but only in part. Many of the indicia of active competition are present in plaintiff's operations in 1967. Plaintiff got all its contracts by competitive bidding. None of the goods it produced were of the sort—missiles, bombs or warships—which in practice can be produced by only a few companies already overloaded with orders. With no great help from the Gov-

ernment, plaintiff competed with large and small companies that had previously manufactured and even designed and possessed the tooling for the items under bid; some of the contracts awarded plaintiff were obtained in competition with such companies.

In only 8 percent of its contracts, by volume of sales, was plaintiff the only bidder. Mr. Ball testified, credibly, that he would bid on small items that nobody else would "fool with." In the 90 percent of cases where others bid, plaintiff's bids were not a mere shade lower than other bids, but substantially lower. In a group of 92 contracts shipped, the average of the bids next higher than plaintiff's was 152 percent of plaintiff's bid; the average highest bid was 211 percent higher than plaintiff's bid.

The Government, well supplied with previous price history and its own, internal estimates of the cost of the items advertised, stood ready to cancel solicitations whenever it felt that all the bids were unreasonable. Actually, 47 of the solicitations on which plaintiff bid were cancelled for this reason. Of these, plaintiff was the low or only bidder in 12; in 35 there was a higher bid than plaintiff's.

No showing has been made, whether by comparison of plaintiff's successful bids with Government-estimated costs, with earlier costs or with earlier bids by plaintiff or otherwise, that plaintiff quoted increasingly high prices or sought otherwise to take advantage of the decrease in competition and the consequent shortage of available contractor capacity. It rather appears that plaintiff fought hard to get the business, and lowered its prices to do so. A striking illustration appears in the roadwheel assembly contracts, plaintiff's largest job in 1967, where in the second contract plaintiff lowered its bid from $577 to $357.

It is therefore concluded that plaintiff's own competitive efforts were a substantial cause and source of its prosperity in 1967; the wartime lessening of competition could not have been the sole source of plaintiff's success. *Compare Armstrong* v. *War Contracts Price Adjustment Board*, 15 T.C. 625, 637 (1950), *aff'd* 194 F. 2d 875 (D.C. Cir.), *cert. denied*, 343 U.S. 967 (1952); *X-Ray, Inc.* v. *Renegotiation Board*, *supra*.

Conclusion

The refinement, so far as possible, of the effect of the distorted market on the subject part of plaintiff's profits, in terms of excessiveness of profits, is left for the conclusion, below, in which all the factors are weighed.

The Factor of Fair and Equitable Dealing and the Public Interest

Also to be considered are any other factors required by "the public interest and fair and equitable dealing." Section 103(e)(6), note 1, *supra*. The public interest requires both that unreasonable profits be recouped and that sufficient profit be allowed as will promote the production in volume of quality goods for use in war and defense production. Fair and equitable dealing with the contractor demands that he be given full measure of the favorable consideration contemplated by the statute.

CONCLUSION

The record provides no basis for a precise division of the dual causation of plaintiff's profits as between plaintiff's merits and the market distorted by war. A determination in the nature of a jury verdict is, therefore, made that half of the plaintiff's renegotiable sales are to be attributed to plaintiff's own merits, unaffected by the decline in competition, and half are to be regarded as affected by the diminution of competition by reason of the increased level of Government procurement for war, and therefore subject to sharing with the Government.

The profits on the half of plaintiff's sales held attributable to plaintiff's own qualities are determined not to have been excessive within the intendment of the Renegotiation Act. Though made possible by the war and the consequent increase in Government demand, these profits were the product of plaintiff's merits and efforts: its "exceptional effort" (32 CFR § 1460.10(b)(3), *supra*), its competitiveness, high efficiency, its contribution to the defense effort, and the substantial risks it assumed in undertaking fixed-price production of the variety of products involved by means of extensive and intricate subcontracting.

Conclusion

On the record made here, these profits were reasonable. Under the stated policy of the Renegotiation Act, only excessive profits are to be eliminated from contracts with the United States in the interest of the "sound execution of the national defense program." Section 101, 50 U.S.C. App. § 1211 (1970). No rule or principle says that the profit made on the highly efficient production for war of good quality materiel in volume is excessive when it exceeds the contemporaneous statistical average profit of comparable industry, composed of good, bad and indifferent producers. The Renegotiation Act does not require that a small contractor who in a risky business makes a contribution to the defense effort by the efficient production of large amounts of war goods at low prices shall have its profits reduced to the level of an average producer making average profits.[9] The very purpose of the statutory system for the determination of excessiveness on the basis of the several prescribed factors, without the use of any single formula, was to permit flexible adjustment to just such a case as is here presented. Were the renegotiation law to "treat the effective producer the same as the ineffective producer, the high cost producer the same as the low cost producer . . . an important incentive to the able and efficient would be lost." [10]

The plaintiff's profits on the remaining half of its 1967 sales are, however, subject to sharing with the Government, as in part the product of a sharply increased Government demand, in wartime, with a consequent distortion of the competitive market. Half of total renegotiable sales of $2,582,942 is $1,291,471; half of total renegotiable profits of $478,297 is $239,148. The question is, therefore, what was the excessive portion of the profits of $239,148.

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[9] When the circumstances have warranted, profit-ratios-to-sales of 18 percent, and more, have been held reasonable and not excessive. *B-E-C-K McLaughlin & Associates, supra,* (profits of $904,669 on sales of $4,848,918; 18.66 percent); *Offner Products Corp.* v. *Renegotiation Board,* 13 CCF ¶82,173 (1968) (profits of $205,257 on sales of $602,971.10; 34.04 percent); *Martin Mfg. Co.* v. *Renegotiation Board,* 44 T.C. 559 (1965) (profits of $270,298 on sales of $1,495,950; 18 percent); *cf. Winfield Mfg. Co.* v. *Renegotiation Board,* 17 CCF ¶80,977 (1971).

[10] *Renegotiation of War Contracts,* Additional Report of the Special (Truman) Committee Investigating the National Defense Program pursuant to S. Res. 71, 77th Cong. S. Rep. No. 10, part 5, 78th Cong., 1st Sess. 6 (1943).

Conclusion

Consideration of the amount to be recouped as excessive begins, in this case, with the statistics of profits earned by comparable industry. Among the industries on which there is evidence in the record, that of manufacturers of "miscellaneous machinery, except electrical" is for the present pur pose closest to plaintiff. This industry had a range of profit, i.e., profit as a ratio of sales, of 4.38 to 14.58.

The other industries on which statistics from different sources were introduced in evidence where the "fabricators of wire products and miscellaneous fabricated metal products industry," with a profit ratio of 8.4 percent, the "metal working machinery and equipment" industry with a range of profit ratios from 9.4 to 11.0 percent, and "other fabricated metal products manufacturers" with a range of 7.4 to 8.7 percent. These are rejected, in favor of comparison with the "miscellaneous machinery, except electrical" industry, because the complexities and hazards of the plaintiff's business and the variety of products it produced in my opinion create a wider rather than a narrower possible range of profits for its members. The "miscellaneous machinery, except electrical" industry, with its wider range of profit ratios, is therefore the more comparable one.

In favorable recognition of plaintiff's efficiency and its other qualities described above, the high-range rate of 14.58 percent profit in the "miscellaneous machinery, except electrical" industry will be applied here as reasonable for plaintiff. The application of the allowed rate of 14.58 percent to the sales of $1,291,471 presently under consideration gives a profit of $188,296, which is found to be reasonable.[11] The difference between the actual profits of $239,148 and the reasonable profits of $188,296 is $50,852, which is found to be the excessive portion of profits.

The allowed rate of 14.58 percent is deemed reasonable in part because of reasons associated with the comparability between plaintiff's business and the "miscellaneous machinery,

[11] The Renegotiation Board's regulations provide that the amount of excessive profits is deducted from sales, as well as from profits, for the purpose of determining "the relation of retained profits to sales." 32 CFR § 1460.3 (1974). The decision made here is not a determination that a particular percentage of profit is reasonable or that the excess over a certain percentage is excessive. The decision here, as stated in the text, is that $50,852 of plaintiff's profits in 1967 were excessive.

Conclusion

except electrical" industry. Comparison of plaintiff with a manufacturer of "miscellaneous machinery, except electrical" is at best imperfect, and the use of the maximum in the profit range of that industry compensates for possible injustice to plaintiff from the use of the standard. The maximum is utilized because it is the Government that has the burden. Not having shown that plaintiff should be compared with the manufacturer at the bottom, mid-point or any particular point on the scale from 4.38 to 14.58, and having in mind the uncertainties of plaintiff's business and the variety of its products the Government has proven only comparability with the manufacturer who made profits, at the top of the scale, of 14.58 percent of his sales.

But the predominant reason for the application of the high range profit ratio rather than a lower range ratio on the half of plaintiff's profits now under consideration, is the favorable consideration to which plaintiff is entitled under the several statutory factors determinative of excessive profits.

First, highly favorable consideration is given to plaintiff for the efficiency with which it produced in volume quality materiel for the prosecution of war. In enacting the Renegotiation Act of 1951 Congress singled out efficiency as the one factor for which "favorable recognition must be given." § 103(e), note 1, *supra*. In earlier legislation, all the factors, efficiency among them, had been required, equally, to be "taken into consideration." Sec. 403(a)(4)(A), Act of 1943, *supra*. The distinction given efficiency by the new language, the Senate Committee on Finance reported, "will promote efficient operations by furnishing a strong practical incentive." S. Rep. No. 92, 82d Cong. 1st Sess. 9 (1951). The use of the high range profit ratio here to recoup as excessive only $50,852 of total renegotiable profits of $478,297 will provide such "strong practical incentive."

Plaintiff has also deserved and been given favorable consideration under the other statutory factors considered above, notably for the risks it assumed in producing under its extensive and intricate system of subcontracting. In the special circumstances of this case, described under "Risks Assumed", above, there is no room for the principle by which a lower rate of profit is allowed for subcontracted production

than for in-house production. 32 CFR § 1460.14(b)(3)(i), note 3, *supra.*

Under the factor of risks assumed, plaintiff also receives much favorable consideration for its close pricing and commendable competitiveness in producing on a firm, fixed-price, lowest-bid basis. While the half of plaintiff's sales and profits now under consideration were in part the product of a distorted market, in which competition had declined, plaintiff took no undue advantage, but rather assumed large risks, added to by the increase in demand, to produce as competitively as it knew how. The risks and the efficiency displayed in producing in volume to meet the added demand outweigh the advantages plaintiff got from the diminution in competition.

The judgment, finally, is based on plaintiff's advancement of the Congressional policy of encouragement of small business and the additional factor that plaintiff is itself a small business. "Considerations of company size" may properly affect the application of the statutory factors. 32 CFR § 1460.8(b) (1974).[12] That plaintiff is itself a small business heightens the regard it deserves for its efficiency, for the risks it assumed, for its extensive use of small business subcontractors and for the other of its merits and achievements.

Both purposes of the Renegotiation Act—the elimination of profiteering in defense contracts by the recoupment of excessive profits and the allowance of sufficient profit to motivate war production in volume—will be accommodated by the judgment here made that plaintiff's profits in 1967 were excessive in the amount of $50,852. Judgment in this amount will serve to give incentive in the form of profit to this plaintiff, to others like it, and to industry in general to

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[12] "Characteristics inherent in the operation of a small company, if shown to be relevant in a particular case, are taken into consideration by the Board in applying the factors described in section 103(e) of the Act. For example, under the efficiency factor, it may be shown that a small contractor, through greater flexibility, was able to schedule and complete the performance of a contract more expeditiously than his larger competitors, or that by closer personal supervision he achieved lower costs or a better product. Under the risk factor, the small contractor undertaking renegotiable production unrelated to his ordinary commercial business may be shown to have been endangered to a greater extent than larger contractors by the possible cancellation of the Government program. Considerations of company size may also affect the application of other factors." 32 CFR § 1460.8(b) (1974).

Syllabus

make the effort and assume the risks required to produce efficiently to meet the nation's needs for goods in defense and war. The retention by plaintiff of $427,445 of its renegotiable profits of $478, 297 in the circumstances does not give excessive profits.

Accordingly, it is for the foregoing reasons held that plaintiff's profits in 1967 from contracts and subcontracts subject to renegotiation under the Renegotiation Act of 1951 were excessive within the meaning of the Act in the amount of $50,852. Judgment for the United States in this amount, less appropriate tax credits, should be entered on defendant's counterclaim, with interest as provided by law.

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534 F. 2d 250

CARRIER CORPORATION v. THE UNITED STATES

[No. 267-74. Decided March 17, 1976]

ON DEFENDANT'S REQUEST FOR REVIEW OF TRIAL JUDGE'S ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION AND TRIAL JUDGE'S ORDER DENYING DEFENDANT'S MOTION FOR NOTICE TO THIRD PARTIES

Patents; pleading and practice; notice to third parties.—This suit was filed seeking reasonable and entire compensation for alleged unlicensed use of plaintiff's patented inventions incident to performance of a Government contract, and is before the court at this time for review of the trial judge's order denying defendant's motion for reconsideration of an earlier order denying defendant's Rule 41(a)(1) motion to notice certain proposed third parties, only one of whom remains under consideration, and who allegedly supplied the accused equipment to the Government. It is *held* that since Rule 41(a)(1) provides that a notice shall issue to any person who *appears* to have an interest in the subject matter of the suit, a person against whom the United States alleges a nonfrivolous claim for indemnity is a party who *appears* to have such an interest. If such a party is not given notice he will not be bound by our rulings on validity and infringement and he can raise those issues if and when the United States sues him in another forum. The trial judge's order is vacated, and appropriate notice to the proposed third party shall issue accordingly.

Patents; pleading and practice; third-party practice; notice.

[1] A party against whom the United States alleges a nonfrivolous claim for indemnity is a party who "*appears*" to have an interest in the subject matter of a pending suit charging patent infringement

by the United States and who may be notified to appear and assert his interest within the contemplation of Court of Claims Rule 41(a)(1).

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Robert S. Swecker, attorney of record, and *J. Preston Swecker*, appeared for plaintiff.

Thomas J. Scott, Jr., with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before DAVIS, SKELTON, and BENNETT, *Judges*.

PER CURIAM: This case comes presently before us on defendant's Rule 53(c)(3) request for review of the trial judge's order, dated August 13, 1975, denying defendant's motion for reconsideration of an earlier order (March 18, 1975) which denied defendant's Rule 41(a)(1) motion to notice proposed third parties Hercules Container Industries, Inc. (Hercules), and National Compactor and Technology Systems, Inc. (National). On the briefs, defendant has advised us that it no longer seeks notice to Hercules under this request for review. A request for review of still another order, denying a motion to notice Peabody Galion Corporation, was abandoned upon oral argument. In our order filed November 7, 1975, we invited National to appear as amicus curiae for the purpose of making its position known relative to whether formal Rule 41(a)(1) notice should issue to it. No such appearance was entered. In the principal action plaintiff sues for its reasonable and entire compensation under 28 U.S.C. § 1498 (1970) for unlicensed use of its patented inventions incident to the performance of a Government contract.

Briefly, the trial judge held that proposed third party National (who supplied the accused equipment to the Government) did not appear to have an interest in the instant proceedings sufficient to require Rule 41 notice (a) because the prime contract under which this contractor supplied the accused equipment to the Government did not contain patent indemnity provisions, and (b) because the patent indemnity provision is not mandatory and necessarily implied in these

contracts under the doctrine of *G. L. Christian & Assoc.* v. *United States*, 160 Ct. Cl. 1, 312 F. 2d 418, *rehearing denied*, 160 Ct. Cl. 58, 320 F. 2d 345, *cert. denied*, 375 U.S. 954 (1963). The trial judge certified his order denying reconsideration for prompt review under Rule 53(c)(3).

At the outset, we think the Government somewhat amiss in subjecting the trial judge to undue criticism for undertaking to decide that a patent indemnity clause should not be implied under the doctrine of *G. L. Christian & Assoc.* v. *United States*, *supra*. Defendant itself raised the *Christian* doctrine, and argued that ASPR regulations, especially 32 C.F.R. § 9.103 (1973), indicated a strong federal procurement policy that the United States when it is buying commercially available goods should be indemnified against infringement, just as a private party would be under section 2–312(3) of the Uniform Commercial Code. Moving from these observations, defendant asserted that as a potential indemnitor, National appeared to have an interest in the subject matter of these proceedings. On other facts, one might even suppose that, having assumed the risk of an adverse decision by actively posing an issue for the trial judge's ruling, defendant could thereafter be precluded from asserting that the matter was not properly before him in the first place. *See* 1B MOORE'S FEDERAL PRACTICE, para. 0.405[8] at 765. We shall leave that possibility open for future cases.

Under Rule 41(a)(1) a notice may be issued to any person "who appears to have an interest in the subject matter of any pending suit to appear as a party and assert his interest therein." A person against whom the United States alleges a nonfrivolous claim for indemnity is a party who "*appears*" to have such an interest. This court has no jurisdiction to decide whether the claim for indemnity is in fact valid, but on the other hand if such parties are not given notice under Rule 41(a)(1) they will not be bound by our rulings on the validity and infringement of the patent and can raise those issues if and when the United States sues them in another forum. *See Bowser, Inc.* v. *United States*, 190 Ct. Cl. 441, 420 F. 2d 1057 (1970). In these circumstances it is better to send notices to such parties whenever the indemnity allegations seem nonfrivolous, and to allow the noticed party to

decide for itself whether it will run the risk that the Government's indemnity claim if ultimately made will not be sustained. In this instance, the Government's claims over seem to us substantial; not frivolous. But of course we do not pass on the merits of those claims or decide that they are correct. We make this determination solely for the limited purpose of determining whether notice should issue under our Rule 41(a)(1).

It is therefore ordered, upon consideration of defendant's request for review and oral argument, that Trial Judge Joseph V. Colaianni's order dated August 13, 1975, denying defendant's motion for reconsideration of the order of March 18, 1975, be and the same is hereby vacated. Appropriate notice to the proposed third party shall issue in accordance with this order. The case is remanded to the Trial Division for further proceedings.

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531 F. 2d 1018

JACOB L. PETE and JAMES W. PETE v. THE UNITED STATES

[No. 17–72. Decided March 17, 1976. Defendant's suggestion for rehearing en banc and motion for rehearing denied April 23, 1976]

ON THE PROOFS

Eminent domain; taking; just compensation; fair market value; Wilderness Act.—Plaintiffs seek just compensation under the Fifth Amendment and 28 U.S.C. § 1491 for three custom-made, gasoline-powered cabin barges, 25 to 60 tons, located on Basswood Lake, Minnesota, and utilized in conjunction with operation of its shore land as a sports fishing and hunting resort. Pursuant to the Wilderness Act, 16 U.S.C. § 1131 *et seq.* (1964) and implementing regulations, defendant took not only plaintiffs' land but all other privately owned land bordering on the lake, banning all commercial enterprises and imposing restrictions on air and surface navigation of the lake except by canoe. Credible witnesses testified that removal of the barges over land was impossible and that it was technically and physically impractical to disassemble the barges, transport them outside the area and reassemble them for further use. On the basis of said testimony, it is *held* (1) that defendant has wholly frustrated plaintiffs' further use of their barges and inferentially destroyed their value; (2) that plaintiffs' property was legally taken as of the declaration of taking, January 19, 1966, by inverse condemna-

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tion, for which plaintiffs are entitled to compensation; (3) that reconstruction costs as of January 19, 1966 less depreciation reflects the fair market value of the barges and constitutes reasonable and just compensation; and (4) that the fair market value of the barges is: Jacob L. $46,800, Russell Lee $54,000, and Gail Adena $52,200. Judgment is entered for plaintiffs with the amount of recovery to be determined pursuant to Rule 131(c).

Eminent domain; just compensation; measure of compensation; fair market value; depreciation.

[1] In determining just compensation under a Fifth Amendment taking, depreciation must be subtracted from the original value of the property taken in order to arrive at the fair market value as of a certain date.

Eminent Domain ⇐ 129

Eminent domain; just compensation; test.

[2] The guiding principle of just compensation is reimbursement to the owner for the property interest taken. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. In many cases, this principle can readily be served by the ascertainment of fair market value—what a willing buyer would pay in cash to a willing seller.

Eminent Domain ⇐ 122

Eminent domain; just compensation; measure of compensation; generally.

[3] In determining the measure of just compensation for property taken, the essential question is always what has the owner lost, with the owner's indemnity being measured in different ways depending on the circumstances of each case. Ascertainment of value is reached by a reasonable judgment of the Court based on its consideration of all relevant facts.

Eminent Domain ⇐ 129

Eminent domain; just compensation; measure of compensation; fair market value.

[4] Considering all relevant facts, including the unique character of plaintiffs' barges, in that they are larger in all dimensions, heavier, more strongly constructed, more durable than ordinary barges or boats suitable for overnight inland water travel, and absent a ready or actual market with comparable sales figures to provide a yardstick of fair market value, it is appropriate to determine fair market value by the reproduction cost less depreciation approach.

Eminent Domain ⇐ 133

Eminent domain; taking; date of taking.

[5] Since the Wilderness Act and implementing regulations provided that the Government's action was subject to existing property rights, plaintiffs' rights in the subject barges were not extinguished automatically as of the date of promulgation of the regulations

prohibiting commercial enterprises, additional governmental action by contractual agreement or condemnation proceedings being contemplated and necessary. Because the declaration of taking covering plaintiffs' real estate was the first substantial interference with their use and enjoyment of the barges whose operation was directly dependent upon the real estate, the date condemnation proceedings were commenced is the appropriate taking date.

Eminent Domain ⇐ 124

Eminent domain; taking; what constitutes.

[6] Federal law recognizes that, although there may be no official intention to acquire any property interest, certain governmental actions entail such an actual invasion and deprivation of all or most of an owner's property interest that a constitutional taking must be implied. Thus, where plaintiffs operated their property as a sports fishing and hunting resort, using in conjunction the subject custom-made, gasoline-powered barges, where pursuant to the Wilderness Act and implementing regulations the United States condemned all land surrounding the lake area, prohibited use of gasoline-powered engines on the lake, and imposed restrictions on air and surface navigation, and where credible witnesses testified that removal of the barges over land was impossible and that it was technically and physically impractical to disassemble the barges, transport them outside the area and reassemble them for further use, the vessels were rendered useless and their value totally destroyed by the Government's activities in creating and administering the area. Defendant's actions constitute a substantial, direct and immediate interference with plaintiffs' use and enjoyment of the barges and is a taking within the meaning of the Fifth Amendment entitling plaintiffs to just compensation.

Eminent Domain ⇐ 2(10)

Eminent domain; taking; what constitutes; regulation containing restrictions.

[7] When the effect of a governmental regulation on a citizen's property is so pervasive that the property is greatly depreciated in value or that the owner's right to use the property is substantially interfered with, the citizen is entitled to compensation.

Eminent Domain ⇐ 2(1)

Ernest I. Reveal, for plaintiff. *Solly Robins*, attorney of record. *Robins, Davis & Lyons*, of counsel.

Herbert Pittle, with whom was *Assistant Attorney General Peter R. Taft*, for defendant.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, and DAVIS, *Judge*.

Opinion of Trial Judge

PER CURIAM: This case comes before the court on defendant's exceptions to the recommended decision, filed August 19, 1975, by Trial Judge Charlotte P. Murphy, pursuant to Rule 134(h), having been submitted on the briefs and oral argument of counsel. Upon consideration thereof, since the court agrees with the trial judge's recommended decision, as hereinafter set forth*, it hereby affirms and adopts the same as the basis for its judgment in this case. Therefore, it is concluded that plaintiff is entitled to recover and judgment is entered for plaintiff with the amount of recovery to be determined pursuant to Rule 131(c).

OPINION OF TRIAL JUDGE

MURPHY, *Trial Judge:* This action is brought by plaintiffs seeking just compensation under the Fifth Amendment and 28 U.S.C. § 1491 (Supp. II, 1972), plus interest and costs, for plaintiffs' three cabin barges or large houseboats, whose usefulness has been effectively destroyed by inverse condemnation action of defendant. The factual issues before the Court in this case are:

1. Whether it was impossible to remove the three cabin barges intact over land from their floating location on Hoist Bay in land-locked Basswood Lake, Minnesota.

2. Whether it was technically and physically impractical to disassemble the three cabin barges, transport them out of the Boundary Waters Canoe Area in the Superior National Forest in northeastern Minnesota, and reassemble them elsewhere for further use.

3. What was the fair market value of the three cabin barges as of January 19, 1966.

The legal issue is:

4. Whether defendant's action, banning the use within the Boundary Waters Canoe Area of plaintiffs' three floating motor powered barges for commercial purposes, constitutes an inverse condemnation compensable under the Fifth Amendment and 28 U.S.C. § 1491 (Supp. II, 1972).

For reasons hereafter discussed, the Court holds for plaintiffs.

*Whereas the court adopts the trial judge's separate findings of fact which are set forth in her report filed August 19, 1975, they are not printed herein since such facts as are necessary to the decision are contained in her opinion.

I.

Prior to January 19, 1966, plaintiff, Jacob L. Pete (the father) and plaintiff, James W. Pete (the son) were owners of 59 acres of land on Hoist Bay in Basswood Lake in northern Minnesota, about 4 miles from the Canadian border. Basswood Lake overlaps the border between the two countries. Both plaintiffs were born and have always resided in Ely, Minnesota, 17 miles from the Canadian border.

Each of the Petes owned an undivided one-half of an undivided one-quarter interest in the real estate. The remaining interest was owned by the Izaak Walton League of America Endowment. Plaintiffs' land consisted of two noncontiguous parcels. The larger parcel of about 40 acres was unimproved land, while the smaller parcel was the headquarters of the Petes' business and source of livelihood, called Pete's Cabin Boats. Each of the Petes owned an undivided one-half interest in the business and all improvements on this land.

The Petes also owned three large floating cabin barges, called the Jacob L., the Russell Lee, and the Gail Adena. These barges had steel or steel plated hulls, two-story deckhouses with steel pipe railings containing lounges, galleys, cabins and sleeping accommodations for a total of 38 people. The barges were 40–50 feet long; 16–20 feet wide; about 20 feet high; 44–61 tons gross weight or 50,000–75,000 pounds weight by water displacement; and had 50–110 horsepower engines.

These barges were built on site, because Basswood Lake was virtually landlocked and transportation of objects of that size and weight to plaintiffs' base of business activity at Hoist Bay was difficult, if not impossible. In summer, these barges were used to transport, house, and feed hunting and fishing parties. In winter, they housed hardy hunters. As required by State law, plaintiffs obtained a hotel and motel license for the operation of their barges.

In 1964, Congress passed the Wilderness Act, 16 U.S.C. § 1131 *et seq.* (1964). Under the authority of this Act, the United States in cooperation with Canada established a four million acre wilderness area in northeastern Minnesota and Canada. Section 1133(c) specifically banned structures, in-

stallations, commercial enterprises, permanent or temporary roads, use of motor vehicles, motorized equipment, motorboats, aircraft landing, or other form of mechanical transport in a wilderness area, subject to existing private rights and other specific statutory provisions of the Act.

The roadless area of the northern portion of the Superior National Forest in Minnesota, renamed the Boundary Waters Canoe Area (hereafter BWCA),[1] was specifically to be governed by regulations which the Secretary of Agriculture was directed to establish:

> * * * [I]n accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams, and portages: *Provided*, That nothing in this chapter shall preclude the continuance within the area of any already established use of motorboats. [16 U.S.C. § 1133(d)(5)(1964).]

On December 21, 1965, the Secretary of Agriculture promulgated regulations governing the use and enjoyment of the area. Originally, 36 C.F.R. § 251.85 (1967), now 36 C.F.R. § 293.16 (1974). The regulations banned all commercial enterprises, privately owned property, private buildings, floating living quarters, aircraft, permanent roads, and the storage or mooring of boats throughout the BWCA.

On January 19, 1966 under the Declaration of Taking Act, 40 U.S.C. § 258a (1964), defendant filed a complaint and declaration of taking in the District Court of the District of Minnesota, and obtained an order for immediate possession of plaintiffs' land. In an effort to continue to operate their business even on a limited basis, plaintiffs filed an application for a special use permit to conduct daily sight seeing trips around Basswood Lake by cabin barge for senior citizens and persons unable to canoe or backpack, but the application was denied by the Forest Service. Simultaneously, plaintiffs and defendant were attempting to negotiate a land trade, plaintiffs' land for Government-owned land outside the BWCA.

In 1969, these negotiations terminated and plaintiffs were ordered to cease their business operations and remove all

[1] The nearest town outside the BWCA was Ely, Minnesota, 8 miles away, in the extreme northeasten corner of Minnesota.

personal or movable equipment. As a consequence, defendant's Declaration of Taking action was tried in the Federal District Court for the District of Minnesota at Duluth by Judge Philip Neville on June 23–July 2, 1969, with a decision being filed on September 11, 1969.[2] A second trial was held by Judge Neville in June 1970, after which the determination was appealed to the Eighth Circuit, which handed down a reversing decision on August 25, 1971, with the latter decision being modified on October 1, 1971.[3]

At the district court trial, defendant contended it had taken only the real estate and structures permanently attached to that realty. Plaintiffs argued that the three cabin barges were fixtures under Minnesota law and, therefore, a part of the realty. Plaintiffs were able to convince two juries and a district court judge, but not the Eighth Circuit, of the merit of their contention that at the time of the taking in January 1966, the barges were a necessary, integral, and component part of plaintiffs' land operation and, therefore, the barges were considered constructively annexed to the land and were fixtures.

Since the barges were not fixtures, they were not covered by the original declaration of taking and the district court had no jurisdiction over them. The parties, subsequently, reached an agreement with respect to the real estate. Thus, plaintiffs' remaining claim—for just compensation for the Fifth Amendment taking of the three cabin barges by inverse condemnation—is the subject of the litigation in this Court under 28 U.S.C. § 1491 (Supp. II, 1972). Four days of trial were held in St. Paul, Minnesota.

II.

Expert Witnesses

The crucial evidence on each of the factual questions in the instant case is the expert testimony, the adequacy of their expert qualifications, and the weight to be accorded to the testimony of the various witnesses.

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[2] *United States* v. *967.905 Acres of Land*, (claim of Jacob and James Pete), 305 F. Supp. 83 (D. Minn. 1969), which contains additional factual details of the history of plaintiffs' Hoist Bay location and operation.

[3] *United States* v. *967.905 Acres of Land*, 447 F. 2d 764, 766 (8th Cir. 1971), *cert. denied* 405 U.S. 974 (1972).

Plaintiffs had three experts, who had also testified in one or both of the prior trials in the district court. By stipulation of the parties, specified portions of testimony of Charles R. Moore, Trevor White, and James E. Klapmeier were put in the record, on the basis that their testimony in the instant trial would be the same as their previous testimony in the district court in 1969 and 1970. Counsel for both parties adopted the objections of counsel in the prior proceedings. After a study of these transcripts, the Trial Judge adopted the rulings of Judge Neville on those objections, as reflecting this Court's views.[4]

Defendant's expert witnesses were Peter John Johnson, Jr. and Sydney Gernander. Both testified live, but Mr. Gernander had also testified at the second district court trial and his prior testimony figured in plaintiffs' cross-examination of that witness.

A. Plaintiffs' witnesses:

1. *Charles R. Moore*

Mr. Moore, President of C. W. Moore Co., Inc. in Buhl, Minnesota, is a general contractor engaged primarily in the building moving business, and his company is the largest house moving business in the northwestern part of the United States. Mr. Moore visited the premises of Petes' operation, traveling from Ely across Fall Lake and then proceeding across the Portage to the Hoist Bay property, frequently stopping along the way to examine the character of the road and its dimensions. He also carefully examined and measured the barges on site. He testified pertinently and knowledgeably relative to factual issues one and two.

Mr. Moore was a good and credible witness, whose testimony is well founded and is entitled to considerable weight, for he was well qualified, as an experienced general contractor and the president of the most capable building moving company, to express an expert opinion of the transportability issues. Defendant's counsel was unsuccessful in shaking his testimony by cross-examination.

2. *Trevor White*

[4] Also, by agreement of the parties and the Court's direction, the full transcripts of the two prior trials became part of the record as joint exhibits.

Mr. White, Executive Vice President and formerly Director of Engineering for Fraser Shipyards, Inc., Superior, Wisconsin, is a naval engineer trained in Northern Ireland, an internationally known shipbuilding center. For over 10 years, he had been responsible for the final determination of bids, costs, and pricing of his company's shipbuilding products. He studied drawings of the barges, a check list of all items incorporated on the original vessels, and made a complete personal inspection of them, including going on board and examining the interior and exterior of each one in detail.

Mr. White was thus able to give a knowledgeable opinion of the fair market value based on reconstruction costs of the barges by similar construction as of January 19, 1966, documented by full worksheets of the cost items upon which his total figures were based. He also gave opinions on the transportability issues.

Mr. White has impressive technical credentials in the field of naval architecture and naval engineering. He was a fine and credible witness, whose testimony is well founded and is entitled to very great weight as a well qualified expert in the areas in which he was expressing his opinion, nor was his testimony undermined on cross-examination.

13. *James E. Klapmeier*

Mr. Klapmeier has been president of Boatel Co., Mora, Minnesota, the largest builder of houseboats in that state, since its founding in 1954. With an assistant, he spent 2 days on location with the barges, carefully observing and measuring every aspect of them. He had design charts and his own records of costs of construction of similar craft, upon which to base his opinion of the cost as of January 19, 1966 of reconstruction of the barges in substantially the same way. He also expressed opinions on the transportability questions.

Mr. Klapmeier's credentials and experience in the boat building field are extensive. His company manufactures houseboats, pontoon boats, and snowmobiles. He is an M.I.T. graduate, magna cum laude, Phi Beta Kappa, in mechanical engineering, with a Masters in Business Administration from the University of Minnesota. He was a knowledgeable, experienced, excellent, and credible witness. His testimony is

well founded and is entitled to very great weight as an exceptionally qualified expert in the areas in which he was expressing his opinion. His testimony was untouched by cross-examination.

B. Defendant's witnesses:

4. *Peter John Johnson, Jr.*

Mr. Johnson,[5] a graduate of Michigan College of Mining Technology, started in the contracting business in 1959 with his father's mining construction business, Johnson & Moore. Later, he organized Hoover Construction Co. in Virginia, Minnesota, as a joint venture with his father's company. His brother, who is not an engineer and 9 years his junior, has since joined the company, while his father retired in 1973. Mr. Johnson's business experience has been almost totally in earth moving and he has not had any experience moving houses or buildings comparable to plaintiffs' barges in size or weight.

As a result of a brief 4-hour visit to the Hoist Bay site and the roads or lakes between there and Ely, Mr. Johnson reached the conclusion that he could successfully remove plaintiffs' barges intact. He made such a representation to the Forest Service in a letter dated August 22, 1974, in which he offered to move the three barges from Basswood Lake to the campground on the western shore of Fall Lake for $18,000 or to move them to Ely for $30,000. This letter gave no details of his proposed plan for accomplishing this objective, although questioning at trial elicited this information. Interrogation by plaintiffs' counsel, however, revealed that the witness had failed to consider many important factors and known inherent hazards of such a project, which crucially affect his conclusion that the barges were transportable intact.

Clearly, Mr. Johnson was unqualified by education and experience to express a valid and reliable expert opinion on

[5] The failure of defendant's counsel to accurately communicate in advance of trial the identity, address, telephone number, and a summary of the views of its expert on transportability to plaintiffs' counsel, prompted the latter to request leave of the Court for the opportunity to take a deposition of Mr. Johnson prior to his trial appearance. The Trial Judge so directed, since defendant's counsel had failed to adhere to a prior directive of the Court, the purpose of which was to insure advance disclosure by both parties of the identity, etc., of witnesses. Mr. Johnson's deposition testimony, as well a his live trial testimony, was made part of the trial record by stipulation of the parties.

the transportability of the barges. Moreover, his views are entitled to little weight, for they have no valid basis and in reality are valueless.

5. *Sydney Gernander*

Mr. Gernander has been a private marine surveyer in Duluth, Minnesota since mid 1965. In his work, he has surveyed ships relative to the extent and validity of damage claims and also supervised ship repair work on company vessels. For 30 years prior to 1965, he worked for various shipyards or shipbuilding companies as a shipfitter or ship mechanic and a foreman or supervisor of fitters.

Plaintiffs contend [6] that Mr. Gernander's credentials and background do not qualify him as an expert witness, since his background was primarily in the mechanical arts and that he lacked any training or experience in appraisal work. Mr. Gernander admittedly had no formal training as an appraiser, although defendant specifically offered him as a valuation expert. Moreover, he has had no experience with the construction of structures comparable to plaintiffs' barges. For these reasons, the Court determines that he is unqualified to give an expert opinion on valuation and his testimony shall be accorded no weight.

III.

Issue One

As to whether removal of plaintiffs' three cabin barges over land intact was an impossibility, both plaintiffs and defendant offered contradictory testimony at trial. All the evidence, however, clearly confirmed that the only overland means of access to and egress from the plaintiffs' former property on Hoist Bay in Basswood Lake is over a road called the Four Mile Portage (hereafter Portage) between Basswood and Fall Lakes, which lies entirely within the no-cut zone of the BWCA.

The Portage divides into two spurs approximately 1 mile from Basswood Lake. The southern or orginal route leads to property formerly owned and operated by Frank Hubacheck. The northern route leads to the Petes' former

[6] The objections of plaintiffs' counsel to the witness's credentials are identical with those lodged by him at the 1970 district court trial.

property on Hoist Bay in Basswood Lake and is a hilly, twisting road built during the 1930's, and bordered by rock outcroppings. All witnesses testifying at trial about the transportability of the barges agreed that they could not be brought out over the northern spur.

The Portage along the southern spur is a road with a log corduroy base filled with gravel and has soft shoulders. In that portion bordering Muskeg Lake, it is directly flooded during the spring of each season and it runs through low-lying land between a swamp and the bank of a hill, generally following the curvature of the lake. Elsewhere along the Portage, the road passed by and through rock ledges (including in 1966, two narrow cuts) and often was bordered by trees and brush growing adjacent to the road surface.

About 1 mile from the Fall Lake end of the Portage is a narrow wooden bridge, approximately 12 feet in width in 1974 as a result of recent improvements. In 1974, the Portage along this route was about 12½ feet wide throughout most of its course, with the remainder of the road being narrower. In 1966, the road was even more narrow and hence, it was necessary to proceed very slowly along the Portage because vehicles could go off the road and become stuck in adjacent ditches.

Defendant's position that the barges are removable over the southern spur of the Portage is supported by witness Peter John Johnson, Jr., who submitted a written offer dated August 22, 1974 to the Forest Service to this effect on behalf of his company, as detailed previously in Part II of this opinion. It was determined, also in Part II, that Mr. Johnson was unqualified by technical background and business experience as an expert on the transportability of objects of the size and weight of plaintiffs' barges.[7] As we have previously indicated,

[7] We could at this point merely note that his testimony was entitled to little weight and pass on to the testimony of other witnesses on the issue. However, we will briefly give the substance of his testimony on this issue, for it is illustrative and confirmatory of the witness's lack of knowledge of the problems involved in transporting these barges in 1966.

Mr. Johnson testified at trial that he proposed to remove the barges from the water prior to the winter freeze, suspend them in cribbing, and transport them across Basswood Lake after the lake was sufficiently frozen. The witness then had two proposed combinations of equipment which were to be driven beneath the barges and cribbing, with the barges then being lowered onto

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Mr. Johnson lacks the knowledge and experience of moving objects of the size, weight, and configuration of plaintiffs' barges. Also, his views are successfully negatived by more knowledgeable persons. Furthermore, his transportability theory overlooks and is contrary to known and not readily surmountable impediments of fact, terrain, weather, nature, etc., enumerated in note 7.

Consequently, his testimony is not only discredited as an expert (as indicated in Part II), but also his view that plain-

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the equipment by means of 50-ton hydraulic jacks, and thereafter transported entirely by the chosen method.

The first method involved a 60-ton three-axle trailer with a set of dollies pulled by a tridem (three-axle) tractor, with the combined weight of approximately 15 tons. The alternative method was to make a sleigh out of 12-inch I-beams pulled by a heavy grader or blade, with the combined weight of 35 tons. Mr. Johnson's proposal then called for the vessels to be drawn by one of the two alternative combinations of equipment across 1,500 feet of frozen ice on Hoist Bay.

In order to get the barges from the lake onto the southern spur of the Portage, Mr. Johnson proposed to cut a 75-foot road behind the Hubacheck cabins by removing hazel bush from the surface of the muskeg ground. Then, according to the witness's testimony, the barges could be moved over the southern spur and the main part of the Portage, placed back on Fall Lake, propelled across that lake, beached at the Fall Lake Campground, and thence transported by road to Ely.

A study of the evidence reveals that Mr. Johnson's testimony is incorrect in several respects. First, the record shows that there were no three-axle tractors available in Minnesota in January 1966. Second, while Mr. Johnson proposes to cut hazel bush and trees along the Portage, he fails to explain satisfactorily how this can be accomplished in an area, which is by law a no-cut zone. Third, he proposes the impractical and unworkable solution of bringing heavy barges out of the water onto a road newly laid over muskeg, a marshy bog, which is singularly lacking in supportive qualities. Fourth, the bridge on the Portage as it existed in 1966 would not support the weight nor accommodate the width of the barges. Fifth, although the southern spur was more easily traversed with equipment than plaintiffs' northern spur in 1966, the remainder or main part of the Portage was much narrower than the width of the barges. Sixth, testimony by plaintiffs' witnesses attested to the difficulties of transporting such heavy equipment over frozen lakes and the dangers of such an undertaking, frequently leading to men and equipment being lost or damaged going through the ice, which the witness has failed to discount or even satisfactorily explain.

Testimony and evidence at trial clearly demonstrated that the transportation of heavy equipment over frozen lakes is a hazardous undertaking for the following reasons: (1) there is no guarantee that the ice is of uniform thickness; (2) even when 100-foot swaths are plowed across the ice, stress points and faults remain; (3) the movement of heavy machinery over the ice generates a wave of water beneath the ice traveling in the same direction and when this wave reaches the shoreline, it is compressed against the ice, which frequently causes the ice to crack; (4) much of the bottom of Hoist Bay on Basswood Lake is muskeg, which generates heat as it decomposes, and the thickness and supportive capacity of the ice in such areas is less; and (5) the ice on Fall Lake is considered unpredictable as a result of the confluence of the Shagawa River and streams from Birch, Gabbro, and Stump Lakes.

tiffs' three cabin barges can be successfully moved intact from Hoist Bay outside the BWCA is without foundation and entitled to little weight.

Plaintiffs rely on the testimony of Charles Moore, Trevor White, James Klapmeier, Thomas Trembath, B. R. Park, John Richards, Richard Swanson, and plaintiffs, in support of their contention that the insurmountable difficulties involved in attempting to move the barges over even the southern spur of the Portage intact rendered removal an impossibility. In Part II, it was determined that Messrs. Moore, White, and Klapmeier were qualified by education and experience as experts in the area of transportability of property such as plaintiffs' barges. The other witnesses offered by plaintiff are familiar with the geographical area, as well as the barges, and are factual rather than expert witnesses.

During his entire busines life, Charles R. Moore has been employed as a general contractor engaged primarily in moving and relocation of all types of structures (houses, buildings, etc.). Indeed, his company, C. W. Moore Company, Inc., is the largest building moving concern in the northwestern part of the United States. Mr. Moore made a meticulous and detailed investigation of the route from Ely to Hoist Bay, especially on the Portage, where he frequently stopped to examine the character of the road and its dimensions. The witness testified that the road was so narrow that it would not accommodate the width of plaintiffs' three barges over the road and the road would have to be widened by blasting, for there was either rock on each side of the road or narrow cuts with high banks. Additionally, he pointed out that in several places the road was very swampy and soft. Also, there was a bridge which would never hold the weight of the barges. Finally, he concluded that the barges could not be moved practicably and reasonably from Hoist Bay outside the BWCA over land without disassembling them.

Mr. Trevor White, a naval engineer employed by Fraser Shipyards in Superior, Wisconsin who had impressive and extensive qualifications in the field of naval architecture, was asked his opinion as to whether the barges could be transported over land without severely and seriously damaging their unitary integrity (*i.e.*, their structures as a whole). He

testified that it would be impossible to move vessels of the size under discussion in their entirety from their location at Basswood Lake over land. In order to move those vessels, he felt it would be necessary to cut them apart to reduce their overall size to make them transportable.

Mr. James E. Klapmeier, President of Boatel Company, Inc., expressed an opinion as to the movability of the boats intact over land. Mr. Klapmeier's credentials and experience in the boat building business were substantial. As to whether the three barges could practicably and reasonably be transported out of Hoist Bay to another location outside of the BWCA over land, because of the vessels' measurements and the materials from which and manner in which the barges were constructed, he felt the physical difficulties would be such that the practical cost of dismantling the barges in order to reassemble them again at some other place would be a higher cost than the construction cost new at that particular site. Therefore, he concluded it was impractical as a purely physical matter.

Plaintiffs presented additional testimony by witnesses from the Ely area, who were familiar with the barges, lakes, and Portage. Since this evidence is corroborative and cumulative, the details will be omitted, but a brief summary is noted below.[8] Because of the familiarity of witnesses Messrs.

[8] Plaintiffs also presented testimony of three witnesses, who were natives of Ely and familiar with the area, especially the Portage: R. Thomas Trembath, B. R. Park, and John Richards. The substance of the testimony of Messrs. Trembath and Park were offered under stipulation of the parties, while Mr. Richards' testimony was live.

Mr. Trembath is the owner of Welding & Machine Works. Mr. Park is a contractor, who has moved buildings and other sizeable structures. Mr. Richards, an employee of the St. Louis Equipment Co., had been in the construction business for 25 years and had moved buildings. All three witnesses, as well as both plaintiffs, corroborated the views of Messrs. Moore, White, and Klapmeier that the barges were not transportable. Mr. Richards said that he knew of no one in the area in 1966 with the equipment required to move the barges over land.

Moreover, defendant's witness, Joseph Kerntz, a native of the Ely area for 71 years, who had worked for Mr. Hubacheck at Basswood Lake since 1938, acknowledged that it was impractical, if not impossible, to seek to transport the vessels out of Basswood Lake over the Portage intact. He had personally been involved in moving structures across the Portage, and he said it would be impractical and foolhardy for anyone to undertake to transport a load of 35 tons, in conjunction with 35 tons of equipment, from the end of the Portage to the public campgrounds on Fall Lake. He also said he believed that anyone who attempted to transport that much weight across the ice would face the certain loss of his equipment and the load. Mr. Kerntz further

Trembath, Park, Richards, and Kerntz with local conditions and plaintiffs' barges over a considerable period of time, their corroborative factual testimony is entitled to weight, although less weight than that accorded to plaintiffs' three expert witnesses.

The cumulative weight of the credible and unrebutted evidence of record leads the Court to the conclusion that because of the size, weight and configuration of the vessels, the lack of equipment capable of carrying the vessels in 1966, the character and dimensions of the Portage along its southern spur in 1966, and the treacherous, unpredictable nature of the ice on Basswood and Fall Lakes, it was not possible to transport the vessels out of the BWCA intact in January of 1966 and the Court so holds.[9]

IV.

Issue Two

As to whether it was technically and physically possible to cut the barges apart by blowtorch, transport the parts out of the BWCA, and weld them back at another location, plaintiffs presented testimony of its three expert witnesses, Messrs. Moore, White, and Klapmeier, all of whom were previously found to be well qualified to express opinions on this question.

Mr. Moore testified that the barges were not designed to be moved and in order to move them over the Portage, they would have to be disassembled, unless the road was widened. He said he did not see how these barges could be disassembled and still be kept in the same shape. After examining the

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stated that it was only with great difficulty that he was able to move much smaller and lighter structures than plaintiffs' barges across the Portage and those structures were damaged in transit.

Furthermore, witnesses John Richards and Richard Swanson (a contractor and resident of Ely, familiar with the area in question, the substance of whose testimony was offered by stipulation) were of the opinion that the vessels could not be transported across the frozen surface of Basswood and Fall Lakes. To do so, they felt, would risk almost certain loss of equipment, damage to or loss of the vessels, and possible injury or death to those involved. Indeed, according to Mr. Richards, the only person in the vicinity engaged in transporting structures and equipment across the frozen lakes in 1966, it was considered so hazardous it was not even an insurable risk.

[9] Judge Neville reached a similar conclusion after seeing the Portage firsthand during the first district court trial. *United States* v. *967.905 Acres of Land, supra* note 2, at 86.

barges and the route, his conclusion was that the barges could not be moved practicably and reasonably from the Hoist Bay area outside the BWCA.

When asked whether the barges could be transported over the Portage without severely and seriously damaging their unitary integrity or their structures as a whole, Mr. White said it would be impossible to move vessels of the size under discussion in their entirety from their location at Basswood Lake over land. He felt it would be necessary to cut them apart, to reduce their overall size and to make them transportable, but by so doing, the barges would lose their shape to such an extent that it would be impossible to rejoin the vessels as they were originally. While prior to cutting apart, sufficient provision could be made for the vessels to retain their shape, but the witness felt this would involve more money than would be justified.

Mr. Klapmeier testified that the physical difficulties involved would be such that the practical cost of dismantling the barge in order to assemble it again at another place would be a higher cost than the construction cost new at the particular site and, therefore, he felt it was impractical as a purely physical undertaking.

Plaintiffs offered additional corroborative testimony by both Petes, Mr. Trembath, and Mr. Park.

Mr. Trembath, an experienced welder authorized to do work on vessels certified by the Coast Guard, indicated that in attempting to disassemble the vessels, before any cutting of steel hulls could begin, the entire superstructure on each vessel would have to be removed; next, the dry dock facilities at the Petes' former property would have to be enlarged in order to facilitate the loading of the hull sections on truck-trailer combinations; and the tremendous heat used to cut the steel hulls would cause warpage of the steel, with reassembly of the hull being extremely difficult. He also indicated that with respect to the Russell Lee, cutting the steel hull would be absolutely impossible, because the steel shell surrounds the original wooden barge hull. Mr. Trembath's conclusion was that disassembling and reassembling the barges would be an extraordinarily expensive and impractical undertaking.

Mr. Park, a carpenter by trade, stated that the principal problem presented was that the walls of the superstructures were anchored to steel plates welded to the deck of each vessel and there were no wood joists or other support to hold the superstructure together after removal from the hull. Therefore, he felt it would be necessary to completely disassemble each superstructure board by board and then literally rebuild it all over again. Consequently, Mr. Park was of the opinion that it would be easier, better, and less expensive to build an entirely new superstructure for each vessel than to attempt to remove, transport, and reconstruct the existing superstructure.

Therefore, in view of the weight of credible and unrebutted evidence indicating that the necessity of enlarging the existing dry dock facilities, the warpage of the steel hulls which would result from cutting them apart, the unique problems posed by the hull of the Russell Lee, and the type of superstructure construction on each of the vessels, the disassembly, transportation, and reconstruction of the vessels outside the BWCA, would be both physically and technically impractical, if not altogether impossible, and the Court so holds.[10]

V.

Issue Three

As to the valuation of plaintiffs' three cabin barges, of whose use plaintiffs have been deprived, both parties have submitted expert testimony. Plaintiffs' experts, Messrs. White and Klapmeier, gave their opinions on the fair market value as of January 19, 1966, based on reconstruction costs, less depreciation.

As determined in Part II, defendant's expert witness, Mr. Gernander, is totally unqualified as an expert on valuation, on the basis of his lack of appraisal credentials. Moreover, his method of valuation was equally objectionable to plaintiffs.

Mr. Gernander briefly visited the barges immediately prior to the second district court trial and he made a determination

[10] For Judge Neville's like determination, *see United States v. 967.905 Acres of Land*, *supra* note 2, at 87.

of fair market value as of June 15, 1970. Then, he arrived at a valuation figure as of January 19, 1966 by adding back 16 percent as the estimated depreciation for the period between those dates. No authority was offered to support the use of this approach, which constitutes an inaccurate, distorted, and unacceptable method of valuation. Depreciation must be subtracted from the original value in order to arrive at the fair market value as of a certain date, not the converse.

By his own admission, Mr. Gernander did not rely upon any comparables, since he did not believe any existed. Nor did he reply upon an income approach in appraising the subject property, Additionally, Mr. Gernander's present testimony inexplicably contradicted his 1970 testimony in that he attributed a 25-year life to the barges in this proceeding, whereas in the 1970 trial, he set the useful life of the barges at 50, 60, and 70 years, respectively. Moreover, the witness incorrectly relied on information supplied by another person (a surveyor) relative to the barges, without personally verifying all the information. Furthermore, he had absolutely no experience with either the operation or construction of cabin barges or vessels similar to the barges in question here.

Mr. Gernander's fair market value figures as of January 19, 1966 for the three barges were as follows: Jacob L., $18,385; Russell Lee, $25,250; and Gail Adena, $25,500, arrived at from 1970 reconstruction costs of $15,750; $20,250; and $21,500, respectively. These figures represented reconstruction costs at a shipyard, not at Hoist Bay, where it would have been more expensive.

This witness's testimony is lacking in foundation primarily, because Mr. Gernander failed to conduct a sufficient personal investigation of all the factual aspects pertinent to the barges and their construction, especially in relation to the crucial valuation date of January 19, 1966. There are, of course, the additional adverse aspects of his testimony, mentioned above. Accordingly, the Court holds that his testimony about the fair market value of the barges as of January 19, 1966 shall be accorded no weight.[11]

Mr. White's appraisal at plaintiffs' request was based on a review of the design and plans of plaintiffs' three barges from

[11] *Garstin* v. *United States*, 173 Ct. Cl. 550, 352 F. 2d 537 (1965), and cases cited therein.

the files of Fraser Shipyards, together with his personal inspection of the vessels, including a review of the condition of the barge hulls, interior and exterior of the houses, as well as all the structures and accommodations on the barges. Mr. White testified that he arrived at reconstruction costs of the vessels as of January 19, 1966 by examining the barges minutely and checking in detail the various drawings pertaining to each vessel. Then, based on his survey and the drawings, he made a complete, detailed estimate of the necessary labor and material, which would be necessary to duplicate the three barges and then costed them out. Mr. White testified that he considered the barges to be in good condition, for they showed signs of considerable care throughout their life. He estimated that the useful life of the cabin barges would possibly exceed 70 years and that as of January 19, 1966, the extent of depreciation of the barges was 10 percent from new vessel construction.

In view of all these considerations, Mr. White gave barge reconstruction costs as of January 19, 1966 as follows: Jacob L., $53,300; Russell Lee, $58,500; and Gail Adena, $55,660. Since Mr. White believed that the fair and reasonable market value of each barge on that date was the above reconstruction cost figures less 10 percent, his valuation of the barges was: Jacob L., $47,970; Russell Lee, $52,650; and Gail Adena, $50,094.

The subject property was also appraised by Mr. James Klapmeier at the request of plaintiffs. Mr. Klapmeier, together with another member of the Boatel Company, made a personal on-site inspection of the subject property for a period of 2 days, at which time he examined all the component parts of all the boats that were there, took measurements, made the type of testing and appraisal which was usually done when he examined houseboats, went into all of the hold compartments, and looked at every structural and mechanical component of each of these units. On that basis, Mr. Klapmeier undertook to ascertain the reconstruction cost of the vessels new as of January 19, 1966.

In order to arrive at a figure, Mr. Klapmeier used the following procedure: Since the appraisal was made in November 1966, he had to look at his company's cost records to see

what increases there had been in materials, components, and labor, since January 19, 1966. He said this was quite easy to do, since his company was in the day-to-day business of construction of houseboats. Based on his company's experience, he could come up with cost figures which he would have bid on such a project in January of 1966.

Mr. Klapmeier testified that it was probable that plaintiffs' three cabin barges could last at least 150 years, if the degree of care and maintenance they had previously received had continued. He concluded that the extent of depreciation between a brand new boat and the condition of the boats as of January 19, 1966 was 10 percent.

As a result, Mr. Klapmeier arrived at the following reconstruction costs as of January 19, 1966: Jacob L., $52,000; Russell Lee, $60,000; and Gail Adena, $58,000. Since Mr. Klapmeier's opinion of the fair and reasonable market value of plaintiffs' cabin barges as of January 19, 1966, was 90 percent of the replacement cost, his valuation of the barges was: Jacob L., $46,800; Russell Lee, $54,000; and Gail Adena, $52,200.

While both Mr. White and Mr. Klapmeier have excellent credentials as experts, the Court accords more weight to Mr. Klapmeier's opinion and testimony, because his company has specialized in construction of structures similar to plaintiffs' barges, he and his assistant spent 2 days meticulously examining every aspect of the barges on site, and he had available to him actual cost figures for the various components necessary for the reconstruction of plaintiffs' three cabin barges. Mr. Klapmeier's figures were clearly and specifically tailored to the exact specifications of the three barges as of January 19, 1966 and are considered more cost exact. Both Mr. White and Mr. Klapmeier are credible witnesses, but for the above reasons the testimony and valuation figures of Mr. Klapmeier are accorded more weight by the Court.

VI.

Issue Four

Having resolved the factual questions, the Court must now decide whether defendant's action pursuant to regulations

of the Department of Agriculture, banning the use within the BWCA of plaintiffs' three floating motor powered barges as living quarters, for transportation and other commercial purposes, constitutes a compensable taking under the Fifth Amendment and 28 U.S.C. § 1491 (Supp. III, 1973). In determining the measure of just compensation, the Supreme Court stated in *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 633 (1961), that:

> The guiding principle of just compensation is reimbursement to the owner for the property interest taken. "He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *Olson* v. *United States*, 292 U.S. 246, 255. In many cases this principle can readily be served by the ascertainment of fair market value—"what a willing buyer would pay in cash to a willing seller." *United States* v. *Miller*, 317 U.S. 369, 374. See *United States* v. *Commodities Corp.*, 339 U.S. 121, 123; *United States* v. *Cors*, 337 U.S. 325, 333. But this is not an absolute standard nor an exclusive method of valuation.[12]

The essential question is always what has the owner lost,[13] with the owner's indemnity being measured in different ways depending on the circumstances in each case.[14] Ascertainment of value is reached, according to the Supreme Court, by a reasonable judgment of the Court based on its consideration of all relevant facts.[15]

Plaintiffs' three cabin barges are custom-made vessels and clearly unique personal property, for they are larger in all dimensions, heavier, more strongly constructed, more durable, etc., than ordinary barges, houseboats, or other motor powered boats suitable for overnight inland water travel.[16]

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[12] *See also United States* v. *Fuller*, 409 U.S. 488, 490–91 (1973).

[13] *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 635 (1961); *United States* v. *Causby*, 328 U.S. 256, 261 (1946).

[14] *United States* v. *Miller*, 317 U.S. 369, 373–74 (1943); *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

[15] *Standard Oil Co.* v. *Southern Pac. Co.*, 268 U.S. 146, 150 (1925).

[16] The type of custom design and construction methods used in plaintiffs' barges are not in anyway obsolete, according to testimony at trial of Messrs. White and Klapmeier. These witnesses said they would reconstruct the barges in substantially the same way, but any new construction would naturally incorporate any recent developments in construction methods, for no one ever reproduces anything in a totally identical way, especially if the item has had

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Hence, there is no ready or actual market with comparable sales figures to provide a yardstick of fair market value. There are, however, other reliable methods by which fair market value may be determined. For example, reproduction (*i.e.*, reconstruction or replacement) costs, less depreciation, the method to which both plaintiffs' and defendant's experts addressed themselves.[17]

The reproduction cost less depreciation approach, used by both parties and all the valuation witnesses, is a valid method of determining fair market value and one particularly well adapted to use under the circumstances of the case.[18] Based on all relevant facts in the record and especially on the Court's determinations as to the credibility of the valuation witnesses,[19] we conclude that it is the best standard of value under the circumstances of the facts of the instant case.

Before discussing the legal taking aspect of the case, let us consider the date on which plaintiffs' barges were taken, plaintiffs' position is that January 19, 1966, the date condemnation proceedings were commenced against plaintiffs' realty is the proper date. Defendant during this proceeding has also mentioned two other possible dates: December 21, 1965, when the federal regulation prohibiting commercial enterprises in the BWCA (36 C.F.R. § 251.85 (1967)) was promulgated and an unspecified date in 1969, when plaintiffs last used the barges.

Property is legally taken when the taking directly interferes with or substantially disturbs the owner's use and enjoy-

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construction added after its original assembly, as occurred here. Also, the requirements of a location other than Fall Lake could necessitate minor variations in the original construction plans of the barges. *United States* v. *Toronto, Hamilton, & Buffalo Navigation Co.*, 338 U.S. 396, 403 n. 5 (1949).

[17] Original cost is generally not considered a fair measure of current value. *United States* v. *Toronto, Hamilton, & Buffalo Navigation Co., supra* note 16, at 403.

[18] *Standard Oil Co.* v. *Southern Pac. Co., supra* note 15, at 156.

[19] Defendant's expert was found to be unqualified and his conclusions to be without foundation. Plaintiffs' experts, Messrs. White and Klapmeier were both found to be well qualified, but the latter's opinion and testimony was accorded more weight, because his figures were considered to be more cost exact. See Part V of this opinion. *See also Toronto, Hamilton & Buffalo Navigation Co.* v. *United States*, 116 Ct. Cl. 184, 208, 88 F. Supp. 1016, 1022 (1950).

ment of the property.[20] The parties may, of course, agree on a date for valuation purposes, but this date will not be adopted as the proper date, unless it is reasonable in the context of the circumstances and supported by proof. In *Drakes Bay Land Co.* v. *United States*, 198 Ct. Cl. 506, 510–11, 459 F. 2d 504, 505–6 (1972), for purposes of value, it was the day the Government bought the only access to the owner's planned development, the date stipulated by the parties.

The date of promulgation of the regulations prohibiting commercial enterprises, such as plaintiffs operated, and specifically prohibiting plaintiffs' floating motor powered cabin barges was December 21, 1965. This, however, was not the date of the taking of plaintiffs' barges, for the regulation [21] and its underlying statute [22] provided that the Government's action was subject to existing private property rights, which were not extinguished automatically as of that date. Rather, additional governmental action by contractual agreement or condemnation proceedings was contemplated and necessary to complete its ownership and control of the BWCA.[23]

Defendant's argument for a date in 1969, when plaintiffs ceased using the barges, as a taking date,[24] lacks certainty,

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[20] *R. J. Widen Co.* v. *United States*, 174 Ct. Cl. 1020, 1027, 357 F. 2d 988, 993 (1966).

[21] 36 C.F.R. § 251.85 (1967), now 36 C.F.R. § 293.16 (1974), provided that:
"(b) Except as provided in the Wilderness Act, in this section and in §§ 294.2(b), (c) and (e), and subject to existing private rights, there shall be no commercial enterprises and no permanent roads within the Boundary Waters Canoe Area and there shall be no temporary roads, no use of motor vehicles, motorized equipment, or motorboats, no landing of aircraft, and no other form of mechanical transport."

[22] 16 U.S.C. § 1133(c) (1964). For scope of statute, see Part I of this opinion.

[23] Defendant suggests that if December 21, 1965 is the date of taking, plaintiffs are barred from recovery by the statute of limitations, At trial, no proof was presented relative to December 21, 1965 as the date of taking. Defendant, however, stated that even though it does not support that date as the time of the taking, the statute of limitations in the Tucker Act prevents recovery, since more than 6 years elapsed between December 21, 1965 and the filing of this action on January 13, 1972. In view of our conclusion above that December 21, 1965 is not the date of taking, there is no need to pass on this argument. However, defendant's introduction of the 1965 date, for purposes of interjecting the statute of limitations argument, while contending that a date in 1969 is the correct date for purposes of valuation, is illogical and unsupported by authority.

[24] An alternate date of taking was only interposed by defendant during cross-examination of plaintiff James on the second day of the trial. In pretrial submissions and conferences, defendant had assented to January 19, 1966 as the taking date.

for defendant throughout this proceeding has left this date in 1969 unspecified and offered no proof of value as of 1969.[25] We conclude that this argument lacks foundation.

The filing of the declaration of taking on January 19, 1966 covering plaintiffs' real estate was the first substantial interference with plaintiffs' use and enjoyment of the barges. Plaintiffs' use of their barges was directly dependent upon the real estate owned by plaintiffs, their property bordering on Hoist Bay in Basswood Lake. Without a place to dock the three cabin barges for boarding and discharge of passengers, hunters, fishermen, and sightseers, as well as a base of operations for purposes of refueling and maintenance, plaintiffs could not fully utilize their floating, motorized property.

Also reinforcing January 19, 1966 as the taking date, the record shows that plaintiffs had only limited use of the barges between that date and the day in 1969, when they ceased operations and departed from their Hoist Bay property, because of the cloud of condemnation. *Drakes Bay Land Co.* v. *United States*, *supra*. Thus, the date of taking of plaintiffs' three cabin barges was January 19, 1966. *Daily* v. *United States*, 116 Ct. Cl. 723, 733–34, 90 F. Supp. 699, 702–3 (1950).

With regard to whether plaintiffs' barges were legally taken by defendant, this Court said in *Eyherabide* v. *United States*, 170 Ct. Cl. 598, 601, 345 F. 2d 565, 567 (1965):

> Federal law recognizes that, although there may be no official intention to acquire any property interest, certain governmental actions entail such an actual invasion of private property rights that a constitutional taking must be implied. * * * The interference with use or possession may be so substantial and of such a character that it cannot be done without compensation under the Federal Government's regulatory and executive powers. Where these factors exist and a constitutional taking is implied, it is assumed that the United States has acquired a definite interest in the property, permanent or temporary, such as fee title, an easement, a servitude, or a leasehold. [Citations omitted] [26]

[25] Defendant's valuation witness gave barge valuations as of January 1966 and June 1970, but not as of any date in 1969. See Part V of this opinion.

[26] *See also Aris Gloves, Inc.* v. *United States*, 190 Ct. Cl. 367, 374, 420 F. 2d 1386, 1391 (1970), wherein it was stated:

"This Court will readily concede that it was not necessary for the defendant to have actually taken physical possession of the plaintiffs' property in order

Defendant maintains that any loss of the use and enjoyment of the three cabin barges is attributable to the loss of customers by the plaintiffs resulting from the creation of the BWCA, rather than a taking by the Federal Government, and thus the loss is an unintended incident of the Government's activity, citing *Southern Counties Gas Co.* v. *United States*, 141 Ct. Cl. 28, 157 F. Supp. 934, *cert. denied*, 358 U.S. 815 (1958).

Plaintiff, a public service utility company supplying gas to domestic, industrial, and commercial customers in southern California, brought suit to recover damage allegedly suffered by reason of the Government's taking of land in connection with a flood control project, because its facilities were installed and maintained under easements from private owners and rights-of-way granted by two southern California counties and owners of property serviced. The United States did not expressly acquire the company's rights by condemnation. Rather the United States prohibited human habitation in the taking area and raised or removed all structures therein except for certain industrial structures, which were to be raised or buttressed against the maximum possible water elevation. The cost of removing the plaintiffs' facilities under ground would have exceeded their salvage value and would have resulted in a total loss to the company. This Court held that the Government's activity was not a taking of the company's properties within the meaning of the Fifth Amendment, for the loss was due to the project and constituted an indirect, unintended incident of the taking and hence a consequent and noncompensable loss.

This decision, however, is distinguishable both factually and legally. Plaintiffs in the instant case were the owners of real property, which was indisputably taken by the Federal Government in connection with the creation of the BWCA. The subject property in dispute in this litigation was an integral part of the real property which was taken.[27] Therefore, this was not a case of a citizen seeking to recover damages for

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for there to have been a fifth amendment taking. A taking can occur simply when the Government by its action deprives the owner of all or most of his interest in his property."

[27] Compensation for the three vessels could also be readily justified as a severance damage. *United States* v. *Grizzard*, 219 U.S. 180, 185–86 (1911).

the appropriation of the property of another. Moreover, the record in this case establishes that it is not physically possible to remove the vessels over land intact. Nor is it possible to disassemble the vessels, transport them elsewhere, and subsequently reassemble them without effectively destroying the vessels as they presently exist. Although in the cited case, the cost of removing the utility's underground facilities would have exceeded the amount that could be obtained for them as salvage, it nevertheless remained possible to physically remove the property without its complete destruction.

Furthermore, while it is clear that the loss to the utility company in the cited case was the consequence of the removal of its customers, in the instant case, plaintiffs' former customers and the public generally continued to use Basswood Lake and the BWCA. The only difference is that plaintiffs are no longer permitted to use and operate their property in the BWCA. Therefore, the loss of the use and value of the property is not due to the removal of plaintiffs' customers, but instead is attributable to plaintiffs' inability to use their property.

Lastly, and perhaps most importantly, the cited case is distinguishable in that the loss to plaintiffs of the use and enjoyment of their property is not an unintended incident of the taking of the land. Indeed, the Government's intentions in promulgating the Secretary's regulations, 36 C.F.R. § 251.85 (b) (1967), was very clearly to prevent plaintiffs, and others like them, from continuing to operate commercial enterprises in the BWCA. This is also illustrated by the verbiage of the regulations, particularly 36 C.F.R. § 251.85(b)(6) (1967), which must certainly have been drafted with plaintiffs' operation in mind, since it provides that:

> No amphibious craft of any type and *no water craft designed for or used as floating living quarters* shall be moored to, used on, or transported over National Forest land. [Empasis supplied.]

The Government's intention to prevent plaintiffs from continuing to operate is additionally reflected in the statement of the Secretary of Agriculture in promulgating the aforementioned regulations, for the Secretary stated that it was necessary to prohibit the storing of boats on National

Forest land when they are not used on a current visit basis in order to preserve the primitive condition of the canoe area. Consequently, the decision in *Southern Counties Gas Co.* v. *United States*, *supra*, is wholly inapplicable to the instant case and the loss suffered by plaintiffs is not in any way unintended or unforeseeable damage.[28]

Whether the governmental activity complained of has so interfered with an individual's use and enjoyment of his property as to warrant compensation must necessarily turn upon the particular circumstances presented. Additionally, the type of taking which entitles the property owner to compensation under the Fifth Amendment is not limited to any set classification or category of governmental interference.[29] For example, destruction of all uses of property by flooding has been held to constitute a taking.[30] Interference with an owner's use and enjoyment of his property by virtue of military or commercial overflights has likewise been held to be a compensable taking.[31] The denial of access to an owner's property has similarly been held to be a compensable taking.[32] Interference with property by virtue of governmental activity on the owner's land, as well as adjoining land, has also been held to constitute a compensable taking.[33]

When the effect of a governmental regulation on a citizen's property is so pervasive that the property is greatly depreciated in value or that the owner's right to use the property is substantially interfered with, the citizen is entitled to compensation. In *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922), Justice Holmes, speaking for the majority, observed:

> The general rule at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * We are in danger of forgetting that a strong public desire to im-

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[28] *Campbell* v. *United States*, 266 U.S. 368 (1924); *R. J. Widen Co.* v. *United States*, 174 Ct. Cl. 1020, 357 F. 2d 988 (1966); *B Amusement Co.* v. *United States*, 148 Ct. Cl. 337, 180 F. Supp. 386 (1960).

[29] *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Kansas City Life Ins. Co.* v. *United States*, 109 Ct. Cl. 555, 74 F. Supp. 653 (1947), *aff'd* 339 U.S. 799 (1950).

[30] *United States* v. *Lynah*, 188 U.S. 445 (1903).

[31] *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962).

[32] *United States* v. *Welch*, 217 U.S. 333 (1910).

[33] *Eyherabide* v. *United States*, 170 Ct. Cl. 598, 345 F. 2d 565 (1965).

prove the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

Moreover, defendant is equally obligated to compensate owners of both realty and personal property legally taken.[34]

The United States condemned all land surrounding Basswood Lake and prohibited the use of gasoline powered engines on the lake. Plaintiffs cannot land their boats on shore for purposes of repair or storage, nor can they utilize engines to propel the boats, nor can they use the boats for any commercially advantageous purpose. The utility of the boats as property has been effectively destroyed, for the right to drift aimlessly in a landlocked lake is the equivalent of no right at all. Removal is impossible.

In the instant case, plaintiffs' use of the three vessels in issue has been precluded altogether, for the vessels can no longer be used for any purpose within the BWCA. The barges can no longer be moored to BWCA land, used on BWCA lakes, or transported over the National Forest area, including the entire shoreline of Basswood Lake. Hence, plaintiffs no longer have access to or the use of their property within the BWCA.

This interference with plaintiffs' exercise of their property rights in the three barges was a foreseeable consequence of a deliberately conceived governmental program, as evidenced by: the public statement of the Department of Agriculture promulgating these regulations;[35] the issuance of the regulations (36 C.F.R. § 251.85 (1967)); and statements of the Secretary in correspondence in early 1969.[36] *See also*

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[34] *United States* v. *General Motors Corp.*, 323 U.S. 373, 383 (1945) (fixtures and permanent equipment destroyed or depreciated in a temporary taking); *United States* v. *Klamath & Moadoc Tribes*, 304 U.S. 119, 122–23 (1938) (standing timber); *Porter* v. *United States*, 473 F. 2d 1329, 1335–36 (5th Cir. 1973) (Oswald papers); *King* v. *United States*, 192 Ct. Cl. 548, 552, 427 F. 2d 767, 769 (1970) (flooded crops); *Eyherabide* v. *United States*, *supra* note 33, at 607, 345 F. 2d at 570–71 (1965) (target practice damage); *Daily* v. *United States*, 116 Ct. Cl. 723, 733–34, 90 F. Supp. 699, 702–3 (1950) (crops).

[35] Public statement of the Secretary of Agriculture on December 16, 1965, announcing the resource management program to be followed in administering the BWCA.

[36] Correspondence in February–April 1969 between John A. Smrekar, President of the Northern Great Lakes Area Council and the Secretary of Agriculture reveals that defendant had a well defined policy and program for the BWCA, whereby it purchased hundreds of properties, including numerous

Bydlon v. *United States*, 146 Ct. Cl. 764, 175 F. Supp. 891 (1959), in which the Petes, as parties to that action, were not permitted to recover because the then existing means of access, the Government-owned Portage, was not so inconvenient as to give the Petes a way of necessity by air, even though the deprivation of access by air caused a loss in the market value of their resort. The Government had promised in that action that the Portage would remain available to everyone for vehicular traffic so long as it is needed. This promise, of course, was violated and abrogated with the promulgation of 36 C.F.R. § 251.85 (1967). Even more importantly, the Government admitted in the course of that litigation that it intended to cut off all commercial activity in the BWCA as part of its deliberate advance planning. Plaintiffs were, moreover, one of the known and foreseen targets of defendant's program.

Consequently, the vessels have been rendered useless and their value has been totally destroyed by the Government's activity in creating and administrating the BWCA.[37] Governmental action which interferes so extensively with an owner's rights in his property constitutes a substantial, direct and immediate interference with plaintiffs' use and enjoyment of the boats, and is, therefore, a taking within the meaning of the Fifth Amendment.[38]

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resorts and summer cabins; that plaintiffs' use of cabin barges was inconsistent with the program and therefore plaintiffs' operation had to be eliminated; and that under this program, use of the BWCA would be restricted to 2 months rather than the 12 months of use as in the past. This program is particularly well revealed in the Secretary's letter of April 7, 1969 to Mr. Smrekar.

[37] See observations of Judge Neville, *United States* v. *967.905 Acres of Land*, *supra* note 2, at 92. Plaintiffs' excellent demonstrative evidence (maps, aerial and other photographs) was most helpful to the Court, giving it a better understanding of the BWCA and especially Fall and Basswood Lakes and the Portage.

[38] Defendant's refusal to compensate plaintiffs for their barges also constituted selective and unequal, as well as inappropriate, treatment of owners of vessels on Basswood Lake in January 1966, for Mr. Kerntz, who was defendant's witness, testified that the Forestry Service bought a pontoon houseboat, kept on Basswood Lake and moored off Pete's landing, from its owner for the Service's own use; that he (Kerntz) was hired to move the pontoon boat in January or February 1966 from Basswood Lake to Fall Lake over the Portage; that even though the pontoon boat was less than one-fourth the size and weight of one of plaintiffs' barges, it was a very tough job to move it; and that to accomplish the move, he had to melt the ice around the boat, pull the boat up onto the iced lake, move it over to and onto the Hubacheck landing,

(Continued)

Since it is well established that just compensation under the Fifth Amendment means that the owner is entitled to the fair market value of the property at the time of taking,[39] which in this instance the Court has determined to be the reconstruction or reproduction costs of plaintiffs' three barges (as determined by Mr. Klapmeier) less depreciation,[40] the Court holds that the fair market value of plaintiffs' three cabin barges as of January 19, 1966 was:

Jacob L.	$46,800
Russell Lee	54,000
Gail Adena	52,200
Total	[41] $153,000

Plaintiffs in their petition have also requested interest and costs. Pursuant to the Court's holding that plaintiffs are entitled to a particular amount ($153,000) as just compensation for the taking of their barges, plaintiffs are also entitled to interest pursuant to law,[42] and costs,[43] with these amounts to be determined under Rule 131(c).

(Continued)
get it past the cabins located there, all those steps being accomplished with considerable difficulty and requiring great care, even with a crew of at least six men and various pieces of moving equipment.

[39] *New York* v. *Sage*, 239 U.S. 57, 61 (1915); *Olson* v. *United States*, 292 U.S. 246, 255 (1934); *United States* v. *Miller*, 317 U.S. 369 (1943); *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970).

[40] Defendant contends that it should be compensated for plaintiffs' continued possession of the barges from January 19, 1966 to an uncertain date in 1969 by lessening the fair market value figure of each barge to reflect either rent for that period or additional depreciation of 10 percent. During this period, while plaintiffs remained in possession of their former real property and three barges, they continued to maintain that property in the same manner as during their ownership of it. The cost of the maintenance of the barges during this period was in the nature of rent. On this point, the Court is in the same position as the Eighth Circuit in the prior proceeding, for defendant has not offered any proof of fair rental to which plaintiff, of course, would be entitled to respond. *United States* v. *967.905 Acres of Land*, 447 F. 2d 764, 771–74 (1971). Thus, no additional allowance should properly be exacted of plaintiffs in the form of either a rental payment or additional depreciation.

[41] Plaintiffs' petition is accordingly amended to conform the dollar amount requested to reflect proof adduced at trial in this amount on the Court's own motion pursuant to Rule 39(b).

[42] *Daily* v. *United States*, 116 Ct. Cl. 723, 733–34, 90 F. Supp. 699, 702–3 (1950); *Drakes Bay Land Co.* v. *United States*, 198 Ct. Cl. 506, 520–21, 459 F. 2d 504, 512 (1972).

[43] When defendant contests liability in an inverse condemnation case, plaintiffs are entitled to costs. *Rocca* v. *United States*, 205 Ct. Cl. 275, 281–84, 500 F. 2d 492, 495–97 (1974); *Drakes Bay Land Co.* v. *United States*, *supra* note 42.

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CONCLUSION OF LAW

Upon the findings of fact and the foregoing opinion, which are adopted by the Court and made a part of the judgment herein, the Court concludes as a matter of law that plaintiff is entitled to recover, and judgment is entered to that effect, with the determination of the full amount of recovery to be reserved for further proceedings under Rule 131(c) in accordance with this opinion.

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531 F. 2d 547

INTERDENT CORPORATION, ET AL. v. THE UNITED STATES

[No. 55-73. Decided March 17, 1976]

ON THE PROOFS

Patents; infringement.—Plaintiffs seek reasonable and entire compensation for the alleged unauthorized use and/or procurement by the Government of the invention of Patent No. 2,733,713 relating to an electrical powered oral irrigating device. Plaintiffs argue that defendant's use of the Water Pik and of Models 100 and 200 Surgical Jet Lavages infringes the structural combination defined by claim 3 of the patent. It is *held* that the substance or novel aspect of claim 3 which distinguishes the combination from prior art combinations is the composite switch and pinch valve assembly as demonstrated by consideration of the prior art, the prosecution history of the application and the patent itself, and since this element is not present in the accused devices, defendant has not infringed the patent. Plaintiffs are not entitled to recover and the petition is dismissed.

Patents; claims; define invention.

[1] The metes and bounds of an invention are defined by the claims and not by the drawings or specification of a patent.

Patents ⟸ 167(1¼)

Patents; claims; construing and interpreting; generally.

[2] To ascertain the scope of a claimed invention, one looks to the patent specification; however, in order to prevent a fraud on a patent the scope of a claim is not exclusively limited to the specific embodiments shown by the specification. Rather, the structural limitations of a claim may be expanded to include equivalent embodiments that perform substantially the same function in substantially the same way to produce substantially the same result as

Syllabus

the disclosed invention. This is so even though the elements of the combination differ in name, form, or shape.

Patents ⇐ 167(1¼)

Patents; equivalents, doctrine of; file wrapper estoppel.

[3] The range of equivalents to be accorded will depend upon whether the invention is a pioneer invention or merely a small advance over the prior art. If the former, a broad range of equivalents applies commensurate with the patentee's contribution to the art. If the latter, only a narrow range of equivalents applies. The range of equivalents may be limited under the doctrine of file wrapper estoppel if the patentee has narrowed his claims in order to avoid the prior art. The doctrine of equivalents is subservient to file wrapper estoppel.

Patents ⇐ 168(2¼), 237

Patents; equivalents, doctrine of; file wrapper estoppel.

[4] Where a patent depends for its novelty on a single feature, courts are reluctant to expand the coverage of a claim by the doctrine of equivalents to cover a device which lacks that single feature. Thus, where the subject claim was allowed because of the "novel" one-button operated combined flexible valve and control switch, the patentees are estopped, by representations appearing in the file wrapper, from expanding the claim under the doctrine of equivalents to include switch and valve assemblies of broader scope.

Patents ⇐ 168(1), 237

Patents; infringement; combination claim; omission of element.

[5] Each element of a patented combination is considered to be material and essential, and omission of any one of the elements of the combination avoids infringement.

Patents ⇐ 243(1)

Patents; claims; construing and interpreting; differentiation of claims.

[6] Structural limitations which differentiate one claim from another are not to be ignored by the courts; to do otherwise would remove or blur any distinction between the patent claims and would render all claims of equal scope and coverage.

Patents ⇐ 165(5)

Patents; infringement; what constitutes; identity of principle or mode of operation; impairment of function.

[7] An accused device may infringe a patent even though it does not utilize fully or adopt the best mode of practicing the invention. Mere colorable variations of a patented invention do not avoid infringement. Impairment of function and lessening of results, efficiency or advantages do not avoid infringement where the substance is nevertheless appropriated. However, an impaired or inferior de-

Opinion of Trial Judge

vice which does not include the substance or novelty of the claimed invention does not infringe.

Patents ⊜ 234

Sherman Levy, attorney of record, for plaintiffs.

A. David Spevack, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, KUNZIG and BENNETT, *Judges*.

PER CURIAM: This case comes before the court on defendant's motion, filed December 5, 1975, moving that the court adopt as the basis for its decision in this case the recommended decision filed October 10, 1975, by Trial Judge Joseph V. Colaianni pursuant to Rule 134(h), plaintiffs having failed to file any notice of intention to except thereto and the time for so filing pursuant to the rules of the court having expired. Upon consideration thereof, without oral argument, since the court agrees with the recommended decision, as hereinafter set forth,* it hereby grants defendant's motion and adopts and affirms the said decision as the basis for its judgment in this case. It is therefore concluded that plaintiffs are not entitled to recover and the petition is dismissed.

OPINION OF TRIAL JUDGE

COLAIANNI, *Trial Judge:* In this patent suit, brought pursuant to 28 U.S.C. § 1498, plaintiffs, Interdent Corp., Gertrude Rieff, Michael Kabnick, Robert Kabnick, and Garrison Trupp, seek "reasonable and entire compensation" for the alleged unauthorized use by the Government of plaintiffs' patented invention.[1] The parties agreed that the issue of infringement of the patent by defendant would be first determined. The parties further agreed that the amount of plaintiffs' recovery, if any, would be deferred until after a final ruling by the court on the question of infringement.

*Whereas the court adopts the trial judge's separate findings of fact which are set forth in his report filed October 10, 1975, they are not printed herein since such facts as are necessary to the decision are contained in his opinion.

[1] The suit was originally brought by Interdent Corp. The other plaintiffs were subsequently joined on July 23, 1974, pursuant to Rule 62.

The patent in suit, United States Patent No. 2,733,713, hereinafter referred to as the "Kabnick" or "713" patent, issued on February 7, 1956, to Herbert H. Kabnick for an invention entitled "Oral Irrigator." Plaintiff, Interdent Corp., is the present owner of all right, title, and interest in the patent.[2]

Defendant moved to dismiss the original petition, filed on February 7, 1973, on the ground that the then sole plaintiff, Interdent Corp., sought recovery for unauthorized use by Government facilities operating on nonappropriated funds. Interdent Corp., on October 15, 1973, amended its petition to allege unauthorized use by appropriated funds facilities. The court thereafter treated defendant's motion as one for partial summary judgment, and granted it to the extent that Interdent was seeking to recover for alleged use by nonappropriated fund facilities. The remainder of the case was remanded to the trial division for further proceedings. *Interdent Corp.* v. *United States*, 203 Ct. Cl. 296, 488 F. 2d 1011 (1973).

As originally framed by the pleadings, this case presented the usual issues of patent validity and infringement. However, during the pretrial proceedings, defendant agreed not to contest the validity of the Kabnick patent, but to rely solely upon the defense of noninfringement.[3] The Kabnick patent contains 6 claims, but plaintiffs urge the use and/or manufacture by or for defendant of the invention covered by claim 3 alone.

The Patent in Suit

The Kabnick patent describes an electrically powered irrigating device which has a variety of applications in the field

[2] Plaintiffs, Gertrude Rieff and her sons, Michael and Robert Kabnick, were declared owners of all right, title, and interest in the Kabnick patent on December 20, 1968, by a decree of final distribution of the estate of H. H. Kabnick. Gertrude Rieff, representing herself and her sons, assigned a 50 percent interest in the patent to plaintiff, Garrison Trupp, on August 24, 1971. On January 10, 1973, Rieff and Trupp assigned all right, title, and interest in the patent to plaintiff, Interdent Corp. Interdent Corp., as of the filing date of the present action, continued to be the sole and exclusive owner of the patent.

[3] Pretrial proceedings also raised the issue of the assignability of claims for past infringement under the Anti-Assignment Act, 31 U.S.C. § 203. Defendant continued to urge the Anti-Assignment Act as a defense in its requested findings of fact and posttrial brief. However, in view of the results reached herein, the issue need not be considered and any ruling thereon is deferred to a later accounting trial, if that should become necessary.

of dentistry, medicine, and the veterinary sciences in situations where it is desired to irrigate or cleanse with a treating fluid. In a teeth-cleaning operation, the irrigator produces a high velocity jet of fluid which, *inter alia*, stimulates the tissues and cleans the interdental spaces of the mouth.

Structurally, the irrigator includes a covered fluid receptacle. An electric motor is mounted on top of the cover member, with the receptacle being detachably secured to its bottom side. A pump is housed inside of the fluid receptacle such that upon attachment of the receptacle cover member, the pump can be driven by the electric motor. Fluid is transferred by operation of the pump from the receptacle to a flexible discharge conduit and nozzle for application. In addition, a composite switch and valve assembly to simultaneously selectively open the flexible conduit to fluid flow and actuate the motor to run the pump or close the flexible conduit to fluid flow and deactuate the motor to stop the pump is provided.

The Patent Claim

Claim 3, the only claim of the '713 patent allegedly infringed by the defendant, provides:

> 3. An irrigator comprising, a selectively actuated electric motor; a pump drivingly connected to said motor to be driven thereby; a receptacle cover member mounted on said motor; a receptacle for a treating fluid; means detachably securing said receptacle to said cover member; inlet means connecting said pump to said receptacle whereby fluid is drawn from said receptacle; outlet means in said pump for directing fluid therefrom; a selectively opened and closed conduit operatively connected to said outlet for directing outlet fluid from said pump; a nozzle on said conduit for controlling the stream of fluid flowing from the conduit; and a composite switch and valve operatively connected to said electric motor and conduit for selectively simultaneously actuating said motor and opening said conduit to fluid flow and stopping said motor and closing said conduit to fluid flow.

Infringement

Plaintiffs argue that defendant's use of the Water Pik,[4] the Model 100 Surgical Jet Lavage, and the Model 200 Sur-

[4] Registered trademark.

gical Jet Lavage (hereinafter the "Water Pik," "Model 100," and "Model 200," respectively) infringes the structural combination defined by claim 3 of the '713 patent. Since the Government admits use of these 3 accused devices during the relevant accounting period and since, as previously explained, defendant has dropped its defense of invalidity of claim 3, the sole question to be answered is whether or not the accused devices, and structural equivalents, are covered by the claim 3 combination of the patent in suit.

After careful consideration of each party's contentions, and for reasons which will be explained hereinbelow, it is concluded that none of the accused devices infringe claim 3 of the Kabnick patent.

As a first step toward resolving the above question, it becomes necessary to determine the scope and breadth of claim 3.

It is axiomatic that the metes and bounds of an invention are defined by the claims and not by the drawings or specification of a patent. *Strumskis* v. *United States*, 200 Ct. Cl. 668, 675–76, 474 F. 2d 623, 627, *cert. denied*, 414 U.S. 1067 (1973). Equally long established is the interpretive process of looking to the patent specification to ascertain the scope of the claimed invention. *Seymour* v. *Osborne*, 78 U.S. 516, 547 (1870); *United States* v. *Adams*, 383 U.S. 39, 49, 148 USPQ 479, 482 (1966). However, in order to prevent a fraud on a patent, the scope of a claim is not exclusively limited to the specific embodiments shown by the specification. Rather, the structural limitations of a claim may be expanded to include equivalent embodiments that perform substantially the same function in substantially the same way to produce substantially the same result as the disclosed invention. This is so even though the elements of the combination differ in name, form, or shape. *Graver Tank & Mfg. Co.*, v. *Linde Co.*, 339 U.S. 605, 608, 85 USPQ 328, 330 (1950).

This doctrine is no stranger to patent litigation generally or to patent litigation in this court specifically. Indeed, the interplay between this doctrine on the one hand and file wrapper estoppel on the other was succinctly explained by this court in *Tate Engineering, Inc.* v. *United States*, 201 Ct. Cl. 711, 719–20, 477 F. 2d 1336, 1340–41 (1973):

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> The range of equivalents to be accorded will depend upon whether the invention is a pioneer invention or merely a small advance over the prior art. If the former, a broad range of equivalents applies commensurate with the patentee's contribution to the art. *McCullough Tool Co.* v. *Well Surveys, Inc.*, 343 F. 2d 381, 401, 145 USPQ 6, 22 (10th Cir. 1965), *cert. denied*, 383 U.S. 933 (1966); *Priebe & Sons Co.* v. *Hunt*, 188 F. 2d 880, 881, 89 USPQ 299, 300 (8th Cir. 1951), *appeal dismissed per stipulation*, 342 U.S. 801 (1951). If the latter, only a narrow range of equivalents applies. *Soundscriber Corp.* v. *United States*, 175 Ct. Cl. 644, 652, 360 F. 2d 954, 961, 149 USPQ 640 (1966); *Trusty* v. *United States*, 132 Ct. Cl. 192, 199–201, 132 F. Supp. 340, 344, 105 USPQ 474, 477 (1955), *cert. denied*, 350 U.S. 975 (1956); *Richardson* v. *United States*, 72 Ct. Cl. 51, 65 (1930), 7 USPQ 194, 197, *cert. denied*, 285 U.S. 543 (1931). Furthermore, the range of equivalents may be limited under the doctrine of file wrapper estoppel if the patentee has narrowed his claims in order to avoid the prior art. *Graham* v. *John Deere Co.*, 383 U.S. 1, 33, 148 USPQ 459, 473 (1966). Or, as this court has said in connection with an earlier consideration of these doctrines, "The doctrine of equivalence is subservient to file wrapper estoppel." * * *

Defendant, after pointing to the precise language used in claim 3, the prior art, and the prosecution history of the application, argues that certain of the elements of the claim at bar are entitled to only a narrow range of equivalents. For reasons which follow, this contention is sound.

Looking to claim 3, defendant specifically contends that the recitation—

> * * * a composite switch and valve operatively connected to said electric motor and conduit for selectively simultaneously actuating said motor and opening said conduit to fluid flow and stopping said motor and closing said conduit to fluid flow * * *

should be literally construed.

During its pendency in the Patent Office, the claim in suit was rejected on the basis of the system taught by United States Patent No. 1,792,245, which issued to Frederick E. Robinson, and various other patents, which supplemented particular detail of the prior art Robinson system. Specifically, the Patent Office examiner rejected the claim in suit, which corresponded to application claim 9, as unpatentable

over the Robinson patent in view of United States Patent No. 2,295,982 to Joseph Widman and United States Patent No. 2,634,885 to Joseph M. North.

The Robinson patent shows an electric motor driven pump with a combined valve and electric switch for opening or closing a nozzle-tipped discharge hose concurrently with the turning off or on of the electric motor. The Widman patent shows a pump mounted in a fluid receptacle. A motor is mounted above the pump for actuation of the same. Upon actuation of the pump, fluid is removed from the receptacle. The North patent substantially shows the same arrangement as Widman except that the receptacle is provided with a cover and the electric motor is mounted thereupon.

In response, Kabnick pointed out that:

> Applicant has disclosed and is claiming a novel irrigator particularly adapted (though not limited) to irrigation and cleansing of the teeth * * * together with a novel one-button control, combined flexible valve and switch structure.

Kabnick appears to have successfully distinguished all of his pending claims from the Robinson, Widman, and North references by pointing out that none of the prior art patents disclosed or taught his combined flexible valve and switch structure. Specifically, Kabnick stressed that none of these three references—

> * * * discloses a fluid pump supply and control system having applicant's novel compact simplified one-button operated combined flexible valve and pump control switch in a single simple housing mounting a suitable directionally adjustable spray nozzle, which to a great degree makes the claimed irrigator commercially feasible and which is recited in each of the now pending claims. The most pertinent reference to Robinson discloses a cumbersome rudimentary spigot valve with separate externally mounted adjacent switch and the two are not compactly combined for simultaneous valve and switch operation as recited in the claims.

Following an additional Patent Office action in which cosmetic-type objections to the patent specification and claims were made, the patent was passed to issue.

Since the Robinson patent discloses a single lever, simultaneous valve and pump control switch, it appears clear that

the claim in suit was allowed by the Patent Office because of the "novel" one-button operated combined flexible valve and pump control switch.[5] With the above Patent Office prosecution in mind, it is evident that claim 3 should be construed to cover a combination of elements that includes a composite flexible pinch valve and switch device for simultaneously actuating the motor and opening the conduit. Plaintiffs are estopped, by the representations of applicant which appear in the file wrapper, from expanding the claim under the doctrine of equivalents to include switch and valve assemblies of broader scope. *Autogiro Co. of America* v. *United States*, 181 Ct. Cl. 55, 384 F. 2d 391, 155 USPQ 697 (1967). Moreover, in instances such as those at bar, where a patent depends for its novelty on a single feature, courts have been reluctant to expand the coverage of a claim by the doctrine of equivalents to cover a device which lacks that single feature. *Stearns* v. *Tinker & Rasor*, 252 F. 2d 589, 600, 116 USPQ 222, 231 (9th Cir. 1957).

In a long line of cases stretching back at least to *Pacific Submarine & Earthquake Proof Wall Co.* v. *United States*, 19 Ct. Cl 234 (1884), and, as explained more recently in *Strumskis* v. *United States*, *supra*, 200 Ct. Cl. at 676, 474 F. 2d at 627-28, this court has consistently maintained that each element of a patented combination is considered to be material and essential. Thus, the omission of any one of the elements of the claimed combination avoids infringement.

Claim 3 contains an additional limitation which is not found in any of the other claims of the patent in suit. Specifically, whereas claim 3 requires a receptacle cover member for the fluid receptacle upon which the electric motor for operating the pump is mounted, none of the other allowed claims calls for such a structural arrangement. It is well established that structural limitations which differentiate one claim from another are not to be ignored by the courts. To do otherwise would remove or blur any distinction between the patent claims and render all claims of equal scope and coverage. *See Autogiro Co. of America*, *supra*, 181 Ct. Cl. at 74.

[5] It is observed that the prior art collectively suggests substantially all other features recited in the claims.

Having established the proper scope to be afforded claim 3, all that remains is to determine if the accused devices come within the metes and bounds of the claim.

None of Accused Devices Infringe Claim 3

Plaintiff alleges that defendant's use and/or procurement of the Water Pik infringes claim 3 of the Kabnick patent. The Water Pik is a commercial device which comprises a selectively actuatable electric motor for driving a reciprocating piston pump. The pump and motor are located in a suitable housing, with the motor being mounted on a plate which is secured to the housing. A fluid receptacle is detachably secured to the top of the housing and feeds fluid to the pump. The pump emits a pulsating stream of fluid through an outlet conduit which is equipped with a suitable nozzle. The Water Pik is actuated by a single electric switch which starts the motor. In turn, the motor activates the pump to produce a jet of fluid at the nozzle outlet. The Water Pik does not include a valve to open or close the passage of fluid through the nozzle. The motor and pump are both deactivated by turning off the switch. However, because a valve to control the flow of fluid through the outlet conduit is not provided, fluid can be siphoned out of the receptacle if the nozzle is left in a downwardly pointed position.

Plaintiffs have not demonstrated that the accused Water Pik includes a composite switch and valve, or its equivalent, as set forth in claim 3. To the contrary, the testimony of record establishes the Water Pik utilizes a solitary switch for activation of the unit and does not employ a valve for control of fluid flow through the outlet conduit.

It is, accordingly, concluded that the Water Pik does not infringe claim 3 of the patent in suit.

Attention next turns to the Model 100 Surgical Jet Lavage. The Model 100 was manufactured under an Army contract to treat battlefield wounds. The device differs significantly from the Kabnick irrigator. To begin, the device is provided with an inlet conduit, instead of a fluid receptacle, for feeding fluid to a pump. An additional distinction is found in the manner for controlling fluid flow through the discharge conduit. While the Kabnick patent requires a composite switch and

valve for concurrently turning on the electric motor and permitting fluid flow from the discharge nozzle, the Model 100 instead only utilizes a switch to actuate the motor. Actuation of the motor in turn results in fluid flow through the discharge conduit.

Thus, since the Model 100 does not have a composite switch and valve to simultaneously actuate the motor and open the outlet conduit, it does not infringe claim 3 of the Kabnick patent.

Finally, the Model 200 Surgical Jet Lavage is a commercially available device for cleaning and irrigating body wounds. Structurally, it consists of a peristaltic pump which is connected to an electric motor. The motor is mounted next to a fluid receptacle which is provided with a cover. A conduit is provided for conveying fluid from the receptacle to the pump. In turn, the pump conveys the fluid to an outlet conduit and nozzle for application to the wound. A hand-actuatable valve is provided in the outlet conduit to control the flow of fluid therethrough. A separate electric switch which is mounted on the unit's housing actuates the motor to run the pump.

Claim 3 does not cover the Model 200 device because the Model 200 device utilizes a valve for controlling the discharge fluid which is separate and distinct from the electric switch for actuation of the electric motor. This is markedly different from the "* * * novel compact simplified one-button operated combined flexible valve and pump control switch * * *," which Kabnick said was a necessary element of the claim 3 combination.

Moreover, infringement of claim 3 is not found because an additional structural limitation of claim 3 is nowhere found in any of the accused devices. Specifically, none of the accused devices are provided with a receptacle cover member to which the electric motor can be mounted.

Plaintiffs' Impairment of Function Argument

Plaintiffs also contend that the accused devices infringe claim 3 since they are equivalent to the patented device, but with their functions impaired to evade infringement. In other

words, the accused devices are purported to be imperfect copies of the patented device, using the same idea, principle, and teaching embodied therein.

An accused device may infringe a patent even though it does not utilize fully or adopt the best mode of practicing the invention. *Admiral Corp.* v. *Zenith Radio Corp.*, 296 F. 2d 708, 717, 131 USPQ 456, 463 (10th Cir. 1961). Mere colorable variations of a patented invention do not avoid infringement. *Sanitary Refrigerator Co.* v. *Winters*, 280 U.S. 30, 3 USPQ 40 (1929). Likewise, impairment of function and lessening of results, efficiency or advantages do not avoid infringement where the substance is nevertheless appropriated. However, an impaired or inferior device which does not include the substance or novelty of the claimed invention does not infringe. *Pennsylvania Research Corp.* v. *Lescarboura Spawn Co.*, 29 F. Supp. 340, 347, 42 USPQ 375, 382 (E.D. Pa. 1939); *Abbott* v. *Barrentine Mfg. Co.*, 255 F. Supp. 890, 899, 149 USPQ 287, 294 (N.D. Miss. 1966); *Stearns, supra; Admiral Corp., supra.*

In the present case, it has been determined that the substance or novel aspect of claim 3, which distinguishes the combination from prior art combinations, is the composite switch and pinch valve assembly. This is evident, as enunciated above, from a thorough consideration of the prior art, the prosecution history of the application, and the patent itself. Infringement by the accused structures is not proved since an essential element of claim 3 is not present in any accused device. *Strumskis, supra; Stearns, supra;* and *Kay Patents Corp.* v. *Martin Supply Co.*, 202 F. 2d 47, 51, 96 USPQ 225, 228 (4th Cir. 1953).

It is concluded that defendant has not infringed claim 3 of the Kabnick patent. Plaintiffs, accordingly, are not entitled to recover and their petition is dismissed.

CONCLUSION OF LAW

Upon the findings of fact which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are not entitled to recover, and the petition is dismissed.

Syllabus

531 F. 2d 1037

JOHNSON, DRAKE & PIPER, INC., BURNS & ROE WESTERN HEMISPHERE CORPORATION AND MERRITT-CHAPMAN & SCOTT CORPORATION, A JOINT VENTURE v. THE UNITED STATES

[No. 121–73. Decided March 17, 1976]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Contracts; release; duress; post-release claims.—Plaintiff, a joint venture, held a contract awarded in May 1962 for repair and renovation of buildings at Thule Air Base in Greenland. In December 1962 the parties negotiated a supplementary agreement containing an extension of time for several of the contract items and a release of claims existing as of December 31, 1962. After contract completion plaintiff presented claims for extras and changes. Plaintiff seeks under Wunderlich Act standards to reverse the decision of the Armed Services Board of Contract Appeals sustaining the decision of the contracting officer that the release barred the claims. Plaintiff contends that the release is invalid for having been obtained by duress and that if valid, it should be construed to apply only to types of claims other than those presented and, in any event, not to certain of the claims which it asserts arose in 1963 after the release. It is *held* (1) that the Board correctly concluded that the contracting officer did not employ coercive acts in threatening to terminate the contract for default unless plaintiff signed the release in exchange for an extension of time, because the officer believed he had a valid reason to default-terminate for lack of progress, and was making a good faith use of contract remedies. The fear of plaintiff that if it pressed its claim of right to an unconditional extension and were terminated for default it would suffer damage to its reputation, is not duress; (2) that the release applied to all types of claims including those in issue; and (3) that plaintiff is not entitled to compensation for claims it alleges were discovered after signing the release because the underlying facts giving rise to the claims were known to its officers at the time the facts occurred although they may not have been aware of their impact or the total costs. Plaintiff could have asked for a reservation from the release of a right to compensation for the claims now in issue, but it remained silent. Plaintiff is not entitled to recover; its motion for summary judgment is denied, defendant's cross-motion is granted and the petition is dismissed.

Contracts; duress; what constitutes.

[1] A contractor's fear that if it pressed its claim of right to an unconditional extension of time and were terminated for default,

Syllabus

it would suffer a stigma which would disable it from obtaining Government contracts is not duress. The duress by a Government official must be the commission of coercive, i.e. wrongful, acts, which generate in the contractor such a fear of damage to its reputation from a termination for default as permit no alternative but to agree, involuntarily, to acceptance of the terms offered by the official.

United States ⇐ 74(6)

Contracts; duress; economic duress; what constitutes.

[2] Economic pressure and a threat of considerable financial loss are not duress. Some wrongful conduct must be shown, to shift to the Government the responsibility for bargains made by a contractor under stress of financial necessity.

United States ⇐ 66

Contracts; duress; what constitutes.

[3] It is not duress for the contracting officer, convinced that the contractor's excuses for delay in contract performance were invalid, to threaten to make good faith use of the remedies prescribed under the contract. A contractor's free choice between two courses of action, i.e. appealing the contracting officer's decision or accepting his agreement to an extension of time on condition specified, negatives duress.

United States ⇐ 74(6)

Contracts; duress; failure to raise claim of duress.

[4] A contractor's failure to raise a claim of duress until long after fear of its consequences is removed is compelling evidence that there was no duress in fact.

Contracts ⇐ 95(1)

Contracts; release; consideration.

[5] It does not follow, because a claim is by hindsight seen to be meritorious, that an agreement to compromise it was in any wise improper. A party who settles his claim may not avoid the settlement by proof that his claim was just. A release for a lawful consideration is binding though the contractor received only what was otherwise due him.

Compromise and Settlement ⇐ 6(4)

Release ⇐ 13(2)

Contracts; release; post-release claims.

[6] Absent special vitiating circumstances, a general release bars claims based upon events occurring prior to the date of the release. Thus, a release without reservation of "all claims" then under consideration, in exchange for an extension of time operates to bar plaintiff's post-release claims where such claims were based on facts well known to plaintiff prior to the release; and plaintiff's failure to seek to reserve the claims now under consideration from the release is not excused by the fact that the impact of the duress and the totality of the costs were not known, and the claims were not realized to be claims, until later. That an exception clause for

Opinion of Trial Judge

a stated limited purpose was later added to the release is confirmation that no other reservations were a part of the bargain.

United States ⇐ 74(6)

Carl E. Buckley, attorney of record, for plaintiff. *Jarvis, Pilz, Buckley & Treacy* and *Eugene Schaffel*, of counsel.

Ray Goddard, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, and DAVIS, *Judge*.

PER CURIAM: This case comes before the court on plaintiff's request, filed June 4, 1975, for review by the court of the recommended decision, filed March 4, 1975, by Trial Judge David Schwartz, pursuant to Rule 166(c) on plaintiff's motion and defendant's cross-motion for summary judgment, having been submitted on the briefs and oral argument of counsel. Upon consideration thereof, since the court agrees with the trial judge's recommended decision (with the addition of footnote No. 8 by the court), as hereinafter set forth, it hereby affirms and adopts the same, as modified, as the basis for its judgment in this case. Therefore, it is concluded that plaintiff is not entitled to recover, plaintiff's motion for summary judgment is denied, defendant's cross-motion for summary judgment is granted and plaintiff's petition is dismissed.

OPINION OF TRIAL JUDGE

SCHWARTZ, *Trial Judge:* Plaintiff sues to reverse a decision of the Armed Services Board of Contract Appeals in which claims under a contract were held barred by a written release. Cross-motions for summary judgment present issues, to be decided in accordance with the standards of the Wunderlich Act (41 U.S.C. §§ 321, 322 (1970)), of the validity of the release as against a plea of duress and of the applicability of the release to the claims presented. By agreement these were the only issues below and they are the only issues to be decided here.

Plaintiff, a joint venture composed of three construction firms, Johnson, Drake & Piper, Inc., Burns & Roe Western

Hemisphere Corporation and Merritt-Chapman & Scott Corporation, held a contract dated May 7, 1962 for 177 items of repair and renovation, at a cost of $1.9 million, of some 300 buildings at Thule Air Base in Greenland. Shortly before December 31, 1962, the contract completion date of all but three of the contract items, the parties negotiated a supplementary agreement which was added to the contract as Modification No. 6, containing among other things an extension of time for several of the contract items and a release of claims existing as of December 31, 1962.

The work was completed on the following March 31. Several months later, plaintiff presented to the contracting officer 29 claims for extras and changes, of which 12 were settled and incorporated into the contract by supplementary agreements (also "Modifications") and 17, making claim for $1.5 million, were denied as barred by the release. On appeal, the Armed Services Board of Contract Appeals, one member dissenting in part, held 16 of the 17 claims barred by the release. The 17th claim, held unaffected by the release, was remanded for consideration on the merits, and is not involved in the present proceeding.

The plaintiff's contentions to be discussed herein are that the release is invalid for having been obtained by duress, and that if valid, it should be construed to apply only to types of claims other than those presented and in any event not to 11 of the 16 claims in suit, which are said to have arisen in 1963, after the effective date of the release. Additional contentions, not requiring discussion, are that the release is void for illegality as an encroachment on the remedy provided by the Disputes clause and that an exception in the release should be construed as excepting all claims.

It is here held that the Board correctly decided all the issues against the plaintiff. Because the Board's decision is found to be correct in all respects, there is no need to distinguish between the varying degrees of finality which under the Wunderlich Act, *supra*, are to be accorded the Board's decisions of issues of fact and of law.

The setting for the entire case—release and claims and contentions—is the long Arctic winter and the correspondingly short season in which construction work can be done outdoors. Progress of the work according to schedule was of

special importance in the contract, for the early onset of cold weather in Greenland would prevent outside work after the third week in September. Work began in late May 1962. There is no doubt that plaintiff suffered delays of various kinds, although responsibility for the delays has not been fixed. From July to November the plaintiff complained of delays said to be the Government's fault or otherwise excusable, and the Government, in no wise agreeing, complained of plaintiff's failure to keep to schedule.

As late as October 19 plaintiff maintained that despite the delays it was on or close to schedule. On November 20, however, acknowledging that the completion date of December 31 could not be met, and giving a variety of excuses for the delay, plaintiff formally requested an extension of time to February 28, 1963 for some contract items and to August 30, 1963 for others. Upon this, the contracting officer, the division engineer of the Corps of Engineers located in New York City, paid a three-day inspection visit to the site in Greenland and there became convinced that all the excuses were invalid and that plaintiff should be terminated for default. On his return, a meeting was convened on December 10, 1963 of representatives of plaintiff and of the Corps of Engineers at which the contracting officer stated his view that a default termination was warranted and invited plaintiff to present its reasons why it should not be terminated for default. Among those present for the plaintiff were the project manager, five vice-presidents of the three participating firms and two lawyers. Present for the Government were the contracting officer, several branch chiefs and a lawyer. The alleged duress is said to have taken place at this meeting.

The meeting was opened by the contracting officer who stated his above-mentioned views, and plaintiff's representatives then stated in detail the reasons why they felt the delays were excusable and they should receive the extensions of time desired. After a general discussion, the contracting officer in a detailed statement, during which he referred to documents, rejected the reasons which had been offered by plaintiff and adhered to his decision to terminate the contract for default.

Thereupon, in the course of the discussion, the plaintiff's representatives expressed a willingness to do whatever was

necessary to be allowed to complete the work and not be terminated for default. The contracting officer changed his mind because he felt that plaintiffs were "good guys" whose companies had good reputations and should not be required to suffer the harm to their reputation from a termination for default. He would give the desired extension on conditions. The conditions were that plaintiff subcontract certain of the items to another contractor; that plaintiff undertake not to bid on the work at Thule in the following year, 1963; that certain items be deleted from the contract; and, finally, that plaintiff sign a general release.

The vice-presidents and the others representing plaintiff discussed the matter among themselves and agreed that they would accept the combination of extensions and conditions. Their reason was their companies had performed 160 million dollars worth of Government contracts and they could not accept the harm to their reputation and to the future business relations with the Government which might follow from a termination for default. The parties thereupon worked out a written agreement, incorporated into the contract as Modification No. 6, effective December 31, 1962, in which extensions of time were given on four items to February 28, 1963, as requested; seven of the eight items on which plaintiff had requested extensions to August 30, 1963 were required to be subcontracted to the contractor who would receive the award for 1963 work at the Base; and the eighth item was deleted from the contract, with an appropriate reduction made in the contract price. The Modification contained a release of claims arising before December 31, 1962,[1] and further provided that it should not be taken as a waiver of the Government's right to damages for failure to complete the work. In a separate letter, plaintiff undertook not to bid on work at the Base in the 1963 season.

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[1] Modification No. 6, paragraph 8:

"8. The Contractor, for itself, its successors and assigns, does hereby release the United States of America, its officers, agents and employees, from all claims and demands whatsoever, in law or in equity, which against the United States of America, its officers, agents and employees, the Contractor, its successors and assigns now have in connection with or arising out of the performance of this contract, except as to payments earned or to be earned by the Contractor for work performed under the contract."

Opinion of Trial Judge

I

The Claim of Duress

The Board rejected the claim of duress on the ground that plaintiff was composed of three "large, successful and financially secure" companies and was well represented at the crucial meeting; that the contracting officer was convinced in good faith that plaintiff was subject to default termination for inexcusible delays; that the officer initially responded unfavorably to plaintiff's request that it be allowed to finish the work and avoid the damage to its reputation from a termination for default; that the officer then relented and agreed to extensions of time in return for a *quid pro quo* which included a general release; and, finally, that the presence of duress was negatived by plaintiff's failure to claim duress for many months and even for years after the time it alleges that it was put under duress.

Duress, the Board held, would be shown if the contracting officer by coercive, that is, wrongful acts, generated in plaintiff such a fear of damage to its reputation from a termination for default as permitted no alternative but to agree, involuntarily, to the release. *Fruhauf Southwest Garment Co.* v. *United States*, 126 Ct. Cl. 51, 111 F. Supp. 945 (1953). On the application of this standard, the Board correctly concluded, plaintiff had not shown any coercive acts by the contracting officer; the fear that if it pressed its claim of right to an unconditional extension and were terminated for default, it would suffer a stigma which would disable it from obtaining Government contracts was, the Board held, not duress.

Plaintiff challenges the Board's decision on the ground that at the meeting of December 10 the contracting officer threatened the blacklisting of the constituent firms unless the release were agreed to, and that the Board erred in finding that no such threat was made. The evidence relied upon is a paragraph in the memorandum of the meeting dated December 19 and reviewed and signed by both parties. The paragraph relied upon is the preface to a recital of the several agreements reached at the meeting:

5. The Contractor was told that each joint venturer had a previous good reputation in performing Government work and that termination of this contract for default could hurt their reputation. In view of this and the Contractor's indicated willingness to do whatever is possible to complete this contract rather than be terminated for default it was agreed as follows: * * *

The word blacklisting is not used and there is no charge that it was actually spoken by the contracting officer. The contention is that his reference to the effect of default termination on the reputations of the joint venturers was by innuendo a threat that if terminated for default, the three firms would be blacklisted or debarred from obtaining Government business in the future.

The several accounts of the meeting in the record, written and oral, and of the surrounding details provide substantial evidence that in the context of the meeting the contracting officer's reference to loss of reputation from a termination for default were not spoken or understood unkindly or threateningly; that rather the possible harm to the venturers' reputations was a reason the contracting officer relented from his intention to terminate and allowed plaintiff to finish the work, on terms.

But even if, in the course of hard bargaining, a threat of termination were bluntly made, there was no impropriety, without more. Contracting officers doubtless daily and justifiably threaten tardy contractors with a termination for default. This contracting officer had already written several letters to the plaintiff containing such threats. A repetition of the threat, at a meeting called for the very purposes of considering plaintiff's case against a termination for default, could add little to what plaintiff already knew—that a denial of an extension and a default termination might have consequences for future business.

The great value for plaintiff of the agreement reached at the meeting of December 10 was the avoidance of litigation over its excuses for delay, litigation whose outcome might have left a permanent blemish on the reputations of the constituent companies. Plaintiff's position, stated at the meeting and in earlier letters, was that its delays were Government-caused or otherwise excusable as beyond its control and thus

that it was unconditionally entitled to an extension of time. The contracting officer conceded neither excusability nor Government responsibility and steadfastly maintained, from the beginning, that plaintiff had only itself to blame for all the delays.[2] When finally the two sides met to resolve their differences, the contracting officer could not be persuaded otherwise than that plaintiff's excuses were invalid. Plaintiff, defeated in its efforts to convince the officer and faced with a default termination, asked for terms and was offered an extension of time on conditions which its representatives deliberately accepted after weighing the pros and cons. Their predominant motivation was the possibility that a termination for default would so affect their reputation as to cause a loss of future Government business. To avoid this risk they gave up what they knew was their right to appeal the decision of the contracting officer and reverse it on a showing that he was wrong. Their manifest desire to be allowed to finish the contract on almost any terms suggests that they had some doubts, at least, of the success of any legal challenge to a default termination.

In this situation more than one ingredient of duress was lacking. A comprehensive definition of the circumstances constituting duress is impossible; this court has pointed out that each case must be decided on its own facts. *Fruhauf Southwest Garment Co.* v. *United States*, *supra*. But some indicia of duress, positive and negative, are well known.

Economic pressure and "even the threat of considerable financial loss" are not duress. *International Tel. & Tel. Corp.* v. *United States*, 206 Ct. Cl. 37, 52, *n.* 11, 509 F. 2d 541, 549, *n.* 11 (1975). "Economic duress may not be implied merely from the making of a hard bargain." *Aircraft Associates &*

[2] For instance, to the excuse for delays by reason of an inability to obtain prompt clearance of Danish labor for work in Greenland, the contracting officer's response was that plaintiff did not early enough investigate the process of obtaining clearance and for reasons of economy did not ask for Government's consent to use American labor. Another excuse was that the Government had neglected to transport materials; the Government's position was that the supplies had not been delivered to the port of embarkation the requisite number of days before the transport berthed.

The merits of these excuses, largely coincidental with the question of the Government's liability for the claimed equitable adjustments, was not litigated, pursuant to the agreement of the parties to postpone the merits of the claims and limit the issues and the evidence to the validity of the release and its coverage.

Mfg. Co., Inc. v. *United States*, 174 Ct. Cl. 886, 896, 357 F. 2d 373, 378 (1966). The mere stress of business conditions will not constitute duress where the defendant was not responsible for the conditions. *Fruhauf Southwest Garment Co.* v. *United States*, *supra*, 126 Ct. Cl. at 62, 111 F. Supp. at 951. "Some wrongful conduct must be shown, to shift to defendant the responsibility for bargains made by plaintiff under the stress of financial necessity." *La Crosse Garment Mfg. Co.* v. *United States*, 193 Ct. Cl. 168, 177, 432 F. 2d 1377, 1382 (1970).

It is not duress to threaten to make good faith use of the remedies prescribed under a contract. "A party is always entitled to say that if his offer is not accepted he will avail himself of his legal rights; it is only the threat of a wrongful or unlawful act that may constitute duress. Such a threat will amount to duress only if it is sufficient to overpower the will of the other party and prevent the free exercise of his will." *Beatty* v. *United States*, 144 Ct. Cl. 203, 206, 168 F. Supp. 204, 206–207 (1958); 13 WILLISTON ON CONTRACTS § 1607 (3rd ed. 1970). A free choice between two courses of action negatives duress.

By these tests there was here no duress. The Government's representatives committed no wrong. No challenge is made, and no evidence would support a challenge if one were made, to the sincerity of the contracting officer's conviction that plaintiff's excuses for delay were invalid. Nor has evidence been presented showing that the officer's position was so ill-grounded as to be constructively insufficient basis for his "threat" to terminate for default. It was his duty to hold to his position, confirmed during his inspection trip to the site, that plaintiff's excuses were invalid. He was guilty of nothing, except perhaps hard bargaining in the interest of the Government.

Plaintiff's representatives were free to rest on their demand for an extension of time. Their will was not overpowered. Representing substantial companies and represented by capable construction experts and lawyers, they knew well that their alternative was to stand on their position that they were entitled to an extension of time, and accept and appeal from a termination for default. An appeal would be heard *de novo* by a board of contract appeals and their remedies would extend even further than to such a board. Their decision to give

up this alternative and accept the terms offered was a free choice. The economic pressure which in their minds dictated agreement rather than litigation was pressure of their own making. Their fear of the consequences of a default termination had within it a tacit recognition that their excuses for their delays might not stand up in court, and thus that the feared loss of reputation would be deserved.

Finally, a telling indication that no duress was practiced is the long delay before plaintiff spoke out and claimed duress. The work was completed on March 31, 1963, and the claims in issue were presented on July 25, 1963. Plaintiff did not make a claim of duress, the Board held, until August of 1966, at a pretrial conference before the Board of Contract Appeals of the Corps of Engineers.

Plaintiff maintains that it raised the issue of duress in a letter of July 22, 1964, in which it wrote that it "vigorously resisted" the contracting officer's "threats" of termination. Assuming (what a reading of the letter shows is not the case) that this letter was a sufficient claim of duress, the date of the first claim of duress is thereby put back only to July of 1964, a year after the claims were first filed and a year and a half after duress was allegedly practiced in December of 1962.

Plaintiff explains its long silence by saying that an immediate outcry would have jeopardized the extension of time and that after the extension was secure, the silence continued because of plaintiff's conviction that the claims were not within the coverage of the release. The belief as to coverage (whose merits are discussed below) was not so strong, however, as to inhibit plaintiff from an early contention that the release was invalid for lack of consideration.

Mature and intelligent officers and counsel on the plaintiff's side were present at the meeting at which duress was allegedly practiced. Their failure to raise a claim of duress soon after fear of its consequences had been removed is compelling evidence that there was no duress in fact. *Silliman* v. *United States*, 101 U.S. 465 (1879); *Loral Corp.* v. *United States*, 193 Ct. Cl. 473, 482, 434 F. 2d 1328, 1332 (1970); *John Arborio, Inc.* v. *United States*, 110 Ct. Cl. 432, 76 F. Supp. 113 (1948).

Plaintiff further contends that the Board erred in failing to make explicit findings on the merits of plaintiff's excuses for delay and on the number of days of extension of time to which plaintiff was entitled. Had such findings been made, plaintiff urges, it would appear, as it did in *Urban Plumbing & Heating Co.* v. *United States*, 187 Ct. Cl. 15, 408 F. 2d 382 (1969), *cert. denied*, 398 U.S. 958 (1970), that plaintiff was entitled to an extension of time without surrendering its claims and that therefore the release was invalid.

A short answer is that the contention is a non sequitur. It does not follow that because a claim is by hindsight seen to be even entirely meritorious, an agreement to compromise it was in any wise improper. A party who settles his claim may not avoid it by proof that his claim was just. It has long been held that a release for a lawful consideration is binding though the contractor received only what was otherwise due him. *United States* v. *William Cramp & Sons Co.*, 206 U.S. 118 (1907); *Inland Empire Builders, Inc.* v. *United States*, 191 Ct. Cl. 742, 751, 424 F. 2d 1370, 1375 (1970).

Before the Board, moreover, plaintiff failed both to demand the findings whose absence it now criticizes and to provide the evidence of such merit to its excuses and such specific periods of delay for excusable causes as would have provided a basis for such findings. In the administrative proceedings, the parties agreed to limit the issues to the validity of the release and to put in evidence only an outline of the events preceding the meeting of December 10, sufficient to give the setting for the claim of duress. Neither side sought to prove the absolute merit of the claims of excusable delay or their demerit. Findings such as plaintiff now demands were impossible.

Urban Plumbing & Heating Co., *supra*, it may be added, was a very different case from the instant one. There the Government had by a threat obtained from the contractor the equivalent of a release in return for an extension of time to which the contracting officer *knew* that plaintiff was entitled by reason of Government-caused delay. Such knowledge made the officer's conduct wrongful and the release invalid for duress. The case has no bearing here, where without any wrongdoing the parties settled their *bona fide* differences by exchanging a release for an extension of time.

Opinion of Trial Judge

II

The Alleged Limitation of the Release

If the release is not to be invalidated for duress, plaintiff contends that it should be read so as not to bar the 16 claims in issue, because in agreeing to the release the parties had in mind only four types of claims, none of those now in issue, which were the subject of plaintiff's letter of November 20, 1972 and of the discussion of the letter at the meeting of the following December 10. Because this contention is wrong in its facts, it is unnecessary to determine whether it would so revise the terms of the release as to go beyond interpretation or construction and require reformation on proof of mutual mistake.

The contention misdescribes the letter of November 20. The letter and the discussion of its contents, at the meeting, were not concerned with claims, but with delays and plaintiff's excuses for delays, offered as justification for the requested extension of time; the reasons were not characterized as claims until long afterwards. When the contracting officer finally rejected the plaintiff's reasons for delay as grounds for an extension of time, the reasons for delay were left behind and the discussion turned to the elements of what became Modification No. 6, among them the release of "all claims" now under consideration (note 1, *supra*). There is no evidence to support the assertion that in agreeing to give a release of "all claims", plaintiff was thinking of less than all claims.

Indeed, there is some affirmative evidence that plaintiff may have had prominently in mind the basis of at least some of the claims presently made. One of the causes of delay mentioned in the letter of November 20 was the alleged changed condition encountered by plaintiff under the floor of the equipment maintenance building at the Base. To the extent the causes of delay were in plaintiff's mind equivalent to claims, then plaintiff did have the present claims in mind, for several of the claims now in issue are claims for costs incurred by reason of that changed condition.

Certainly no intention on the part of the plaintiff to limit the claims subject to the agreed release was communicated

to the Government at the meeting of December 10. The Government requested and understood that it was to receive a general release. Accordingly, the agreed release was described as general in the summary of the agreements which appears in the parties' joint memorandum of December 19, 1962,[3] and also in the Government's private memorandum for its contract file, required under ASPR 8–602.5, 32 CFR § 8.602–5, when a defaulting contractor is not terminated for default.[4]

The release as it appears in Modification No. 6 encompasses "all claims and demands whatsoever," with an exception: "except as to payments earned or to be earned by the Contractor for work performed under the contract." Note 1, *supra*. The origins of the exception (upon which plaintiff does not rely for the contention now under consideration) confirm the generality of the underlying release.

The exception was added after December 10, at a meeting of counsel for both parties to consider a draft of Modification No. 6. Plaintiff's counsel asked for the exception, in order that the release not cut off plaintiff's right to payments for work done before December 31 and for which the authorizing papers might on December 31 still be in process of arriving from the field. An exception for such a purpose would of course have been unnecessary had the release been limited to four types of claims.

Plaintiff maintains, next, that the contracting officer construed the release in the manner now contended for, in his decision allowing, as not barred, 12 of the 26 claims originally made, and providing for their payment in Modifications Nos. 10–14 to the contract.

This contention, too, has no merit. The claims recognized in Modifications Nos. 10–14 as surviving the release were for actual extras performed at the request of the contracting

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[3] Memorandum for record, December 19, 1962, paragraph 5f.:

"f. The Contractor hereby waives and agrees not to asert (sic) any claims under Contract No. DA–30–347–ENG–432 which arose prior to 31 December 1962. In addition the Contractor will not asert (sic) under any other contract any claim which is related to the performance of this contract."

[4] Memorandum for contract file, December 27, 1962, paragraph 10:

"10. * * *. In addition, the Supplemental Agreement will include a general release from the Contractor to the government for all claims arising out of and in connection with the performance of this contract up to and prior to 31 December 1962."

officer. The right to collect for such work, never disputed, was preserved by the literal terms and the spirit of the exception to the release preserving the right to "payments earned or to be earned by the contractor for work performed under the contract."[5] The claims rejected as barred by the release—those now in issue—are claims for costs incurred by reason of delays allegedly the responsibility of the Government. These claims were disputed from the outset and they fall squarely within the claims bargained to be released.

III

The Application of the Release to 1963 Costs

A final question is raised as to whether the release, as of December 31, 1962, of "all claims" which the contractor and its agents "now have" applies to the claims—11 of the 16 in issue—which seek reimbursement of costs incurred partly or wholly in 1963.[6] These claims, plaintiff urges, had not accrued or arisen as of December 31, 1962 and are therefore not included within the group which was released. One of the five members of the Board dissented from the majority decision rejecting this contention.[7]

So long as costs are not ascertained or ascertainable, plaintiff contends, a claim has not come into existence—has neither arisen nor accrued—and since the full bill of costs for these claims was not known until sometime in 1963, they

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[5] The recognition of claims for extras in Modifications 10–14 is consistent also with plaintiff's understanding of the release, stated in a letter of December 27 enclosing the executed Modification No. 6:

"It is understood that Paragraph 8 of Modification No. 6 does not relate to any changes in scope that may be directed by the Government other than those specifically enumerated therein."

[6] Of the 17 claims whose denial was appealed to the Board, one was held by the Board to be a claim for work which the Government had in January 1963 directed be done, and thus not barred by the release. A second, for increased costs associated with the employment of Danish labor, is conceded to be barred by the release, if the release is not held invalid for duress. Four are claims for costs which were incurred entirely in 1962; plaintiff does not contend that these had not arisen in 1962. The 11 remaining claims are discussed in the text.

[7] Board member William D. McConoughey stated:

"I *concur on the* duress issue. But in construing a release given before substantial completion of the contract (see par. 8 of Mod. No. 6 effective 31 Dec 1962), greater meaning should be attached to the word 'now'. With respect to the 17 disputed claims, costs incurred after 31 December 1962 should not be barred, and should be considered on their merits."

are unaffected by the release. Plaintiff admits that the underlying facts giving rise to the claims were known to its officers at the time the facts occurred but maintains that their impact was not known and they were not realized to be claims until after December 31, 1962.

A review of the claims shows the following:

One of the 11 claims seeks the costs of heating Government-furnished buildings which the bidding documents allegedly implied were centrally heated by the Base or did not require heating. Since the costs were incurred between July 19, 1962 and March 1963, the fact that heating would be required became known to plaintiff almost immediately after it began work in mid-1962.

Another claim seeks additional costs of allegedly unanticipated unusually harsh weather which, coupled with Base regulations requiring that workmen return to quarters during a storm, caused allegedly compensable suspensions of work. Costs were incurred between November 1962 and March 1963, mostly in late December 1962 through February 1963. The suspensions thus began to be known to plaintiff in November 1962.

Two claims seek additional costs of the repair of Government-furnished equipment and the supply of spare parts which the contract allegedly represented would not be necessary. These costs were incurred both before and after December 31, 1962.

The remaining seven claims seek additional costs allegedly incurred by reason of the changed condition already mentoned—the discovery of water under the floor of the building to be used as a repair and equipment maintenance shop—and the failure of the contracting officer to recognize the changed condition. The changed condition was discovered and first reported in July 1962. In four of the seven claims, costs were incurred before and after the end of 1962 and in three costs were incurred only in 1963. What was essentially one claim for the several cost consequences of the single changed condition was divided by plaintiff into 10, one for the basic condition and nine for separate "impact" cost consequences incurred in different buildings in different time periods—three periods entirely in 1962 (the claims for costs in these

periods are not pressed in this part of the case), four periods before and after the end of 1962 and three periods entirely in 1963.[8]

Before the end of 1962, therefore, plaintiff knew all about the present claims except the total of the costs for which claim would be made. It knew not only, as has been admitted, the facts which form the basis of the 11 claims, but it must also have known that these facts would be the basis for claims, when all the costs would be known.

With this knowledge, plaintiff's representatives agreed, at the meeting of December 10, to give a general release. It would have been simplicity itself to have asked for a reservation from the release of a right to compensation for the matters now the subject of the 11 instant claims (or all 16 claims in issue) with their costs to then date and the costs yet to be incurred. It may reasonably be inferred from the record that the representatives remained silent because they understood the bargain they made as calling for an all-inclusive release which would give the Government a release of all claims.

The contracting officer had at that moment denied the extension of time sought to be justified by the alleged changed condition and a variety of other causes, which plaintiff said were, and the contracting officer said were not, the Government's responsibility. The plaintiff's representative must surely have been aware that their agreement to release "all" claims, without explicit exceptions, included not only a claim for the cost consequences of the alleged changed condition but also any other claims disputed by the Government. The post-meeting episode in which plaintiff's attorney asked for and got the addition of an exception clause for a stated limited purpose, is of course confirmation that no other reservations were a part of the bargain.

Plaintiff gets no help from the rule that a claim does not accrue for the purpose of the beginning of a period of lim-

[8] Plaintiff urges that at least the claims in which costs were incurred entirely in 1963 were totally separate and were therefore not covered by the release. The difficulty with this position is that, as the opinion of the Armed Services Board of Contract Appeals makes clear, plaintiff itself sought recovery of these post-1962 costs on the specific theory that they were directly related to and incurred as a direct result of the changed condition discovered in July 1962. Plaintiff itself linked these 1963 costs to the 1962 events with which the release dealt. [footnote by the court]

itations until the damages are ascertainable. *Terteling* v. *United States*, 167 Ct. Cl. 331, 338, 334 F. 2d 250, 254 (1964). The issue here is not a matter of when a claim for damages not yet fully ascertained is barred by the passage of time, but whether a claimant "had" or possessed a claim, sufficiently to reserve it from a general release, at a time when all the damages had not yet been ascertained. The rule for releases is that absent special vitiating circumstances, a general release bars claims based upon events occurring prior to the date of the release. *H.L.C. & Associates Constr. Co.* v. *United States*, 176 Ct. Cl. 285, 293, 367 F. 2d 586, 590 (1966) and cases cited. And no exception to this rule should be implied for a claim whose facts were well enough known for the maker of the release to frame a general description of it and request an explicit reservation. *Cf. Adler Construction Co.* v. *United States*, 191 Ct. Cl. 607, 611–12, 423 F. 2d 1362, 1364 (1970), *cert. denied*, 400 U.S. 993 (1971); *United States Rubber Co.* v. *United States*, 142 Ct. Cl. 42, 46, 160 F. Supp. 492, 495–96 (1958); *Inland Empire Builders, Inc.* v. *United States*, 191 Ct. Cl. 742, 749–51, 424 F. 2d 1370, 1375 (1970).

Plaintiff may not be heard to say that it knew the facts underlying its present claims but not their full impact or that they would become claims. In *Adler Construction Co.*, *supra*, a contractor was permitted, apparently without restriction, to list 13 exceptions to a general release. His additional claims, thereafter made, were held barred. His contention that he obtained sufficient information to frame the additional claim only in discovery proceedings was held not to "excuse his failure to state his exceptions covering his present claims in general terms which would have sufficed the purpose of preserving his right to pursue them." *Ibid.*

In *United States Rubber Co.*, *supra*, the court held a release which excepted "unknown claims" to bar claims based on facts available to but unappreciated by the maker of the release, saying (142 Ct. Cl. at 46, 160 F. Supp. at 495–96):

> * * * if facts were available but not properly assimilated by plaintiff at the time of the termination agreement, plaintiff's failure to comprehend their significance in terms of recoverable expense does not of itself except them from the force of the release. The test is not the state of plaintiff's knowledge, but the availability of

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information which, properly digested, could reasonably be expected to acquaint plaintiff with the existence of a reimbursable cost.

That all the costs in the instant case not yet incurred at the time the release was given is in the circumstances presented no excuse for the plaintiff's failure to seek to reserve the present claims from the release. Most prominent among the circumstances is that with knowledge of the facts constituting the present claims, plaintiff nevertheless expressed full agreement to giving the Government a slate clean of all claims, with an exception not including the claims presently made.

All the challenges to the Board's decision are without merit and the complaint must be dismissed.

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531 F. 2d 554

JAMES P. McCORMICK v. THE UNITED STATES

[No. 173-73. Decided March 17, 1976]

ON THE PROOFS

Taxes; employment tax; employee or independent contractor.—Plaintiff is a public trainer of thoroughbred racehorses, and in this role he trains horses of various owners to win horse races. His relationship to the owner is that of an independent businessman. In addition to a foreman, grooms, hotwalkers and exercise riders whom he hires on a regular basis, he hires other hotwalkers and exercise riders on an irregular basis to walk or exercise horses as the need arises. The issue is whether these free-lance or irregular individuals are independent contractors, in which status their compensation for services would not be wages subject to the tax imposed on wages under Sec. 3101 of the Internal Revenue Code of 1954, or whether they are employees of plaintiff, with their compensation subject to the tax and with the employer charged with collecting and paying the employees' share by withholding from wages under Sec. 3111. For the period in issue, plaintiff complied with Rev. Rul. 72-155 holding that free-lance exercise riders and hotwalkers were employees of the trainer, and timely paid the Federal employment taxes on the irregular workers. He later filed a claim for refund protesting the legal conclusions of the Ruling. Disallowance of his claim not being forthcoming within the prescribed 6-month period, he filed suit in this court for refund of the alleged overpayment. Under the facts and circumstances, it is *held* that the free-lance hot-

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walkers and exercise riders are employees of plaintiff and that the employment taxes were properly collected from plaintiff. Plaintiff is not entitled to recover and the petition is dismissed.

Taxes; employment tax; employee; what constitutes.

[1] The basic standard for determining the presence or absence of an employer-employee relationship for Federal employment tax purposes is whether the person performing the services for another is subject to the other's control or the right to control. The right or degree of control necessary to make one an employee varies with the activity involved, but it is the right or degree of control as to what shall be done and how it shall be done that is commonly exercisable to that business.

Internal Revenue ⇐ 1167.3

Taxes; employment tax; employee; what constitutes.

[2] Free-lance exercise riders hired by a public trainer of thoroughbred horses on an irregular basis to exercise horses when regular personnel are unavailable are employees for Federal employment tax purposes where the trainer is normally in attendance at the track observing the exercise and issues instructions to and controls the riders in accordance with his own program of conditioning a horse as an integral part of his business, the riders rarely deciding what exercises the horse will perform or how it will be done, the riders have an insignificant monetary investment in the services they provide, they assume no financial risk, they earn their pay or the right to it in any event, the trainer generally supplies the saddles and blankets for the horses, and the riders are covered for risk of injury through the trainer's workmen's compensation insurance or the Horsemen's Benevolent Protective Association Assistance Fund. The requisite control is not negated by the circumstance that the riders must have equestrian skills and use good judgment in carrying out the trainer's instructions.

Internal Revenue ⇐ 1167.4

Taxes; employment tax; employee; what constitutes.

[3] Since a free-lance hotwalker needs no special skills and is under the control of the trainer or his other employees as to the manner and means by which he performs his work, the "control" factors revelant to free-lance exercise riders apply as well to hotwalkers, so that a hotwalker is an employee for Federal employment tax purposes.

Internal Revenue ⇐ 1167.4

Taxes; emloyment tax; emloyee-independent contractor

[4] While in close cases, the view of the interested parties with respect to payment of employment taxes is significant, this view is immaterial if the relationship of employer/employee is established under the facts and circumstances of the particular case.

Internal Revenue ⇐ 1167.3

Herbert L. Awe, attorney of record, for plaintiff. *Michael Mulroney* and *William L. Goldman*, of counsel.

Donald H. Olson, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser*, of counsel.

Before SKELTON, KUNZIG and BENNETT, Judges.

PER CURIAM: This case comes before the court on plaintiff's exceptions to the recommended decision, filed March 24, 1975, by Trial Judge Roald A. Hogenson, pursuant to Rule 134(h), having been submitted to the court on the briefs and oral argument of counsel. Upon consideration thereof, since the court agrees with the trial judge's recommended decision, as hereinafter set forth, it hereby affirms and adopts the same as the basis for its judgment in this case. Therefore, it is concluded that plaintiff is not entitled to recover and the petition is dismissed.

OPINION OF TRIAL JUDGE

HOGENSON, *Trial Judge:* This is an action to recover an alleged overpayment of Federal employment taxes for the quarter ending September 30, 1972. Commonly known as social security taxes, such taxes are imposed on wages by the Federal Insurance Contributions Act, under section 3101 of the Internal Revenue Code of 1954 as to the employee's share of the tax, and under section 3111 as to the employer's share, with the employer charged by law with collecting and paying the employee's share of the tax by withholding from wages.

The issue is whether certain persons known as free-lance exercise boys (riders) and hotwalkers, who perform services for plaintiff in his business of training racehorses, are independent contractors, in which status their compensation for such services would not be wages subject to the tax, or whether such persons are employees of plaintiff, with their compensation as wages subject to the tax.

For the purposes of such taxes, section 3121(d) defines the term "employee" as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee * * *."

For the reasons stated herein, it is concluded that plaintiff's free-lance exercise riders and hotwalkers are employees of plaintiff, that the employment taxes were properly collected from plaintiff, and that plaintiff's petition should be dismissed.

The facts in this case are set forth in detail in the findings of fact which follow. They will be summarized here only to the extent necessary to explain the basis for the decision that plaintiff is not entitled to recover.

Taxpayer, James P. McCormick, is a public trainer of thoroughbred racehorses. As such, he trains horses of various owners to win horse races. Sometimes he is the owner or partial owner of horses he stables and trains. His obligations to a racehorse owner include providing shelter, feed, the basic equipment needed for training, daily maintenance and a training program directed toward making the horse a winner of races. The trainer is paid a flat daily fee of approximately $20 for his services and receives a portion of the purse when a horse wins a race. The trainer's relationship to the owner is that of an independent businessman. When necessary peripheral services, such as those of a veterinarian or a blacksmith, are needed the trainer engages the personnel and the cost is normally paid by the owner. In the regular conduct of the horse training business, the trainer retains the services of personnel necessary to assist him in properly training the horses.

Plaintiff uses the services of a foreman, grooms, hotwalkers and exercise riders on a regular basis. He acknowledges that those among such personnel who have a regular, permanent relationship with him are his employees for Federal employment tax purposes. As is commonly done in the racehorse training business, plaintiff obtains the services of other hotwalkers and exercise riders on an irregular basis to walk or exercise horses when the regular personnel are unavailable. It is the status of these people, hired on an irregular, nonpermanent basis, that is in issue here.

The training program involves conditioning the horse for racing through a regimen devised by the trainer according to the trainer's assessment of the horse. The program involves giving the horse some exercise every day. The basic exercises

take the form of a "walk" (leading the horse at a walking pace to provide light exercise or to "cool" the horse gradually after strenuous exercise), a "gallop" (running the horse on the track at less than full speed), and a "work" (running the horse at full speed for short distances). The "walk" is performed by a person called a "hotwalker," or when available and weather conditions permit, by a hotwalking machine which mechanically leads the horse around in a circle. All exercise rider puts the horse through a "gallop" or a "work." The trainer tells such rider what type of exercise is to be accomplished and at which speed and for what distance the horse should be ridden on each occasion.

The trainer is normally in attendance at the track, whether a regular or irregular exercise rider is handling the horse, observing the exercise. The trainer is more cautious and more likely to be present when an irregular or so-called free-lancer [1] is handling the horse because of the free-lancer's unfamiliarity with the horse, or his lack of understanding of the trainer's "modus operandi," or because of the trainer's unfamiliarity with the free-lancer's ability. As a trainer's confidence in a free-lancer increases, the amount of instruction and observation may, to a degree, lessen. The trainer has the authority to countermand an instruction or terminate a free-lancer's job when the work is in progress. In the case of the exericse rider, this is obviously difficult and sometimes impossible to do because of the problem of controlling a racehorse and its rider while in motion. Such orders are rare, given only on the most unusual occasions.

An exercise rider must be experienced and highly skillful to handle a thoroughbred racehorse. To ride an animal as temperamental and physically adept as a racehorse through the trainer-prescribed routine calls for a significant degree of equestrian proficiency. In a literal sense, the exercise rider physically controls the horse when he is astride it. However, the rider's range of discretion is narrow in nature—limited to knowing when to discontinue an exercise to avoid injury to the horse. The exercise rider rarely decides what exercise the horse will do or how it will be done. But in terms of physi-

[1] Wherever applicable the word "free-lancher" will refer both to exercise riders and hotwalkers. Where the word obviously does not apply to hotwalkers, it will refer only to exercise riders.

cal control, the rider makes the horse successfully perform the exercise. To conform with the trainer's instructions, the exercise rider must possess good judgment concerning the stride (distance covered with each movement of the horse's legs) and pace (distance covered in a given time). The exercises normally take place during morning hours when the track is available for that purpose, both the regular and free-lance services being performed during that time. The trainer generally supplies the saddle and blankets for the horse. To save time and prevent disease the horse is usually saddled and ready for the free-lancer to ride. The free-lancer's equipment consists of riding boots and a protective helmet, required by track rules. All exercise personnel are covered for risk of injury while riding a horse, either through the trainer's workmen's compensation insurance (state or privately operated) or through the Horsemen's Benevolent Protective Association Assistance Fund.

The major performance difference between the free-lancer and the regular exercise rider is: When the exercise ends, the free-lancer's work for that specific trainer is done, whereas the regular exercise rider has to be available to perform other duties for the trainer. Free-lance exercise riders are frequently looking for a trainer to hire them on a regular employment basis. Those having regular employment with a trainer endeavor to earn extra money by riding for others on a free-lance basis whenever they can. Harry Stauffer, one of the free-lancers whose employment status is here in dispute, was an exception. Stauffer had been a jockey for 10 years and returned to being an exercise rider. He relished being able to work when he pleased, viewed himself as an independent and did not want to work for anyone on a regular basis. Although free-lancers may work for more than one trainer, they develop familiarity and experience with certain horses, and they usually ride the same horses every day.

During the period in issue, both the taxpayer's free-lancers and his regular exercise rider (Donny Miller) were paid on a per-ride basis. Subsequent to the period in issue the taxpayer provided Miller a guaranteed minimum salary rate not entirely predicated on the number of horses he rode.

Free-lancers were paid only for horses ridden, whereas regular employees also enjoyed a Christmas bonus, received vacation pay and shared in "stakes," which is a portion of the prize money received when a horse wins.

For the period in issue, the third quarter of 1972, taxpayer complied with Rev. Rul. 72–155 [2] which holds that free-lance exercise riders and hotwalkers were employees of the trainer, and timely paid the Federal employment taxes for the individuals [3] whose employment status is in dispute. Subsequently taxpayer filed a claim for refund which stated that these people were not employees but independent contractors and protested that the legal conclusions in Rev. Rul. 72–155 were erroneous. The Government failed to issue a statutory notice of disallowance within the prescribed 6-month period, and the taxpayer subsequently filed suit in this court.

Plaintiff would have a narrow test applied as to what constitutes control for defining the relationship between a racehorse trainer and free-lancers in the conduct of the horse training business.

In summary, plaintiff argues that complete control of the racehorse by the free-lancer when in his custody, with the accomplishment of the prescribed exercise dependent upon the free-lancer's equestrian skills, combined with the fact that the free-lancer's services terminate after the completion of the exercise for which he is retained, and considering the impractibility of the trainer's exerting control or terminating the services of the free-lancer during the course of the exercise, requires a determination that the free-lancer is an independent contractor. As to the free-lancer exercise rider, plaintiff's position merits serious consideration. As to the free-lance hotwalker, the argument lacks force, because there is no doubt about control of the hotwalker by the trainer during the performance of services.

The basic standard for determining the presence or absence of an employer-employee relationship is whether the person

[2] Rev. Rul. 72–155, 1972–1 Cum. Bull. 322, holds that the racehorse trainer exercises or has the right to exercise such control over the free-lance exercise personnel and hotwalkers as is necessary under the usual common law rules to establish the relationship of employer and employee for Federal employment tax purposes.

[3] Ralph T. Anderson and Joseph E. Thomas, hotwalkers. Larry Eversole, Harry Stauffer and Herman Amos, exercise riders.

performing the services for another is subject to the other's control or right to control. *Cape Shore Fish Co.* v. *United States*, 165 Ct. Cl. 630, 636, 330 F. 2d 961, 964 (1964).

Many factors are relevant in applying realistically the common law control test[4] such as existence of control and supervision, or right to control performance (*Deecy Products Co.* v. *Welch*, 124 F. 2d 592, 598 (1st Cir. 1941)); the degree of control required and applicable in the particular vocation involved (*United States* v. *Webb*, 397 U.S. 179, 192 (1970)); opportunity for profit or loss, investment in facilities, burden of risk, whether the services are part of the regular business of the person for whom performed, and whether substantial costs are incurred by the performer of the services (*United States* v. *Silk*, 331 U.S. 704, 716–19 (1947)); degree of skill required (*McGuire* v. *United States*, 349 F. 2d 644, 645 (9th Cir. 1965)); permanency of the relationship, *Avis Rent A Car System, Inc.* v. *United States*, 503 F. 2d 423, 430 (2d Cir. 1974).

No one factor is persuasive or to be considered exclusive. The relationship is to be ascertained by an overall view of the entire situation, not by any rule of thumb, nor by the presence or absence of a single factor. The result in each case must be governed by the special facts and circumstances of the case itself. *Cape Shore Fish Co.* v. *United States*, *supra*, 165 Ct. Cl. at 636–37, 330 F. 2d at 964–65.

The right or degree of control necessary to make one an employee varies with the activity involved, but it is the right or degree of control that is commonly exercisable in that business. *United States* v. *Webb, Inc.*, *supra*, 397 U.S. at 190–93. All that is required is that the right of control exists and be available for exercise. *Deecy Products Co.* v. *Welch*, *supra*, 124 F. 2d at 598.

Taxpayer, as well as any other racehorse trainer, was retained by racehorse owners to exercise his own skill and judgment in conditioning horses for races. He did not retain others to determine what program was to be applied to each horse, but made his own decisions, and issued instructions to those performing services for him in accordance with his own

[4] *See Illinois Tri-Seal Products, Inc.* v. *United States*, 173 Ct. Cl. 499, 512–19, 353 F. 2d 216, 224–29 (1965), for the judicial, administrative and legislative developments leading to unequivocal application of the common law test.

program. His instructions to free-lance exercise riders and hotwalkers were in furtherance of his own program of conditioning a horse. The exercising of any one of his assigned horses, whether performed by a regular or an irregular exercise rider or hotwalker, was done as an integral part of his business, and his instructions to each free-lance exercise rider or hotwalker were an integral part of his program to accomplish his own plan of conditioning a racehorse for a definite purpose—to participate as a winner in a particular race or races.

Treasury Regulations § 31.3121(d)–1 and § 31.3306(i)–1 furnish a guide as to where control rests in this case. Both provide in part:

> * * * That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. * * * [Emphasis added.]

Plaintiff argues in effect that the "what" and "how" are limited to the narrow focus as to what the free-lance rider will do and how he will employ his skills in the riding of a racehorse in an exercise directed in accordance with the instructions of the trainer. The broader view must reasonably be applied in this case. The "what" and "how" concern the distance the exercise will cover and the method to be employed, whether by walking, galloping, working, running in company with another horse, or otherwise, all as instructed by the trainer in accordance with his planned program. This is obviously the degree of control used in the conduct of a racehorse trainer's business, both with respect to regular and irregular exercise riders. *United States* v. *Webb*, *supra*. The requisite control is not negated by the circumstance that the exercise rider must have and exercise equestrian skills and good judgment in carrying out the instructions of the trainer.

Of course, the exercise rider is expected to use reasonable discretion in the handling of a racehorse, and not ride the horse to ruin. Such discretion is not unlike that required of any skilled employee given physical control over an employer's powerful and expensive equipment, to operate the equipment with reasonable care in accordance with the standards of his trade and avoid unnecessary damage.

The right of control in this case cannot be limited to the literal physical control which an exercise rider must exercise over the racehorse during the prescribed ride, and to the circumstance that the trainer does not place himself astride the horse or otherwise place himself in position to direct the performance of the services during the course of the exercise. The exercises prescribed by the trainer are not separate and distinct transactions, unrelated to his structured training program, and his retaining of exercise riders and hotwalkers, whether on a regular or irregular basis, must be considered the hiring of employees for the conduct of his own business operations.

As plaintiff operated his exercise program, it would have been difficult, if not impossible in some instances, for him to furnish directions and instructions to an exercise rider during the course of such ride. However, it is significant that plaintiff, having given precise instructions, placed himself in position to observe the exercise ride. This was known to the exercise rider, and common sense dictates that the watchful eyes of a supervisor are a realistic form of exercise of control of the performance of employees. Moreover, the evidence is clear that on occasion a trainer was able to communicate instructions to the exercise rider during the course of the exercise. With respect to the hotwalkers, of course, there was no practical problem of control during the performance of a particular assignment.

Another factor to be considered in this case is who furnished the equipment. Where equipment is necessary to perform a task, particularly where it is of significant value requiring substantial investment, the person furnishing such equipment in the performance of services may be deemed to be an independent contractor. It is one circumstance to be considered as to whether he is under the control of the alleged employer. *Powers* v. *United States*, 191 Ct. Cl. 762, 773, 424 F. 2d 593, 600 (1970). The hotwalkers furnished nothing. The free-lance riders in this case furnished boots and helmets, which are of nominal value, particularly when compared to the saddles and other equipment furnished by the trainer. The fact that the trainer furnished the saddles

as a matter of expediency does not negate the weight of this factor because it also relates to the investment factor.

The trainer had a significant investment in his business in addition to the cost of equipment provided for the exercise activity. The free-lance riders and hotwalkers by contrast had insignificant monetary investment in the services they provided. The trainer had opportunity for profit or loss that the free-lancers completely lacked. The trainer shared in the rewards when horses won. He had the option of reducing expenses to maintain or increase profits. The free-lancer had no economic leverage. He was restricted to the money that could be earned based on the capacity to ride or lead horses.

The burdens of risk were also unknown to the free-lancer, but common to the trainer. The trainer was subject to loss on his investment and could be denied income by either failing to produce winning horses or to control expenses. In addition, the trainer had to answer to the owner regarding care, maintenance and progress of the horse. The free-lancers, by contrast, were not obligated to anyone and assumed no financial risk that an independent businessman must undertake, unless one considers failure to be paid their wages such a risk. The free-lancers did not even protect themselves against the risk of personal injury. Parties other than the free-lancer assumed the responsibility and cost of preventing injury by providing "pony boys" to catch the horse if the rider lost control during an exercise. The personal injuries of a free-lancer are covered by the trainer's workmen's compensation insurance (as though he were a regular employee) or by the Horsemen's Benevolent and Protective Association Assistance Fund (which fund provides assistance to certain persons connected with horse racing when help is unavailable elsewhere—to which fund the trainers contribute through the payment of fees charged for bringing horses to the starting gate before races). The free-lancer earned his pay (or at least his right to it) no matter what happened, and he had no responsibility except to ride or lead the horse as he was told.

Considering all the foregoing factors, the free-lancers are substantially similar to the coal shovelers in *Silk*, *supra;* the produce unloaders in *McGuire*, *supra;* and the car shuttlers in *Avis*, *supra*, all held to be employees, not independent contractors, even though transients.

The regularity or irregularity of employment did not make a substantial difference in the trainer's calculation of pay, nor did it affect the methods of payment to the regular and free-lance riders and hotwalkers. All of the workers were generally paid at the same time (Friday or Saturday of the week in which the services were performed), in the same way (by check) and at the same place (the trainer's stable). The differences in pay (free-lancers did not receive bonuses, vacation pay or any share in a racehorse's winnings) are inconsequential in the overall setting of the relationships involved.

Of course, the trainer did not unilaterally set the precise time of performance of duties by the free-lancer, but a definite time was mutually agreed upon. The rider was restricted to the morning hours when the track was available for exercising, and the rider had no choice about postponing an exercise to suit his personal convenience. The hotwalker performed his services when a horse needed a walk, not when the hotwalker chose to act. Of course, no free-lancer had to accept any assignment, but none had any discretion about the time of performance of a job accepted.

It appears that the trainer and the free-lancers held the belief that they did not have the status of employer/employees, but that the free-lancers were independent contractors. The validity of their belief is clouded by a serious question as to whether they had any clear understanding of the legal distinctions between the two relationships. It would appear that their attitudes were based primarily on the irregularity and impermanency of their relationships.

It is recognized that in close cases, the view of the interested parties with respect to payment of employment taxes is significant. *Illinois Tri-Seal Products, Inc.* v. *United States*, *supra*, 173 Ct. Cl. at 502, 353 F. 2d at 218.

The Treasury Regulations cited herein state in effect that the description or designation by the parties to a relationship that services are being performed in the capacity of an independent contractor, as distinguished from an employee, is immaterial, if the relationship of employer/employee is established under the facts and circumstances of the particular case. In *Bartels* v. *Birmingham*, 332 U.S. 126 (1947), the Supreme Court held that the parties cannot even change the

relationship by contract, when the relationship was not in fact what they agreed it was. Subject case is not the close one in which significance should be accorded to the views of the parties.

Under the facts and circumstances of this case, both the free-lance exercise riders and the hotwalkers were employees of taxpayer under the common law test.

Accordingly, plaintiff correctly complied with Rev. Rul. 72–155, and is not entitled to recover the Federal employment taxes paid by him on account of the free-lance workers involved in this case.

FINDINGS OF FACT

1. Plaintiff, James P. McCormick (hereinafter referred to as trainer or taxpayer) is, and during the third quarter of 1972 was, a licensed trainer of thoroughbred racehorses, having part interest in several of them.

2. In such business, taxpayer employed various individuals. On the compensation he paid to such individuals during the period here in issue (the third quarter of 1972) he filed Treasury Form 941 and paid Federal Insurance Contributions Act (FICA or social security) and withholding taxes. He filed a timely claim for refund alleging therein that certain individuals for whom either FICA or withholding taxes were paid were not his employees, but were independent contractors. This action was initiated more than 6 months after filing of that claim—which claim was neither allowed nor disallowed.

3. During the third quarter of 1972, covering the calendar months of July, August and September, taxpayer was operating at Delaware Race Course (July and most of August) and Laurel Race Course (September), where he had under his care and supervision as a trainer approximately 15 racehorses. The training operations at both race courses were the same in all major respects.

4. Racehorses are stabled in an area called the "backstretch" which is adjacent to the racetrack. The training and conditioning of racehorses is generally done in the backstretch or on the racetrack.

5. Taxpayer is a public trainer. He accepts horses to train from various horse owners. The trainer receives a flat fee of

approximately $20 per day per horse in exchange for his services, and in addition, receives a bonus when one of the horses he has trained wins money in a race. The trainer's economic incentive is to train horses at minimum cost to win races.

6. A public trainer's relationship with a horse owner is that of an independent businessman who is given the responsibility of training the owner's horse to win races. The trainer, based on his evaluation of the horse's abilities, determines and executes the basic training program which will be followed. The trainer's obligations include furnishing the basic equipment and supplies needed to train, shelter and feed the horses. He secures the services of necessary personnel to assist him in keeping and properly training the horses. To accomplish his training program, the trainer uses the services of a foreman, grooms, hotwalkers and exercise boys (riders) on a regular basis.

7. On behalf of the owner, the trainer engages other people whose services are necessary but peripheral to the basic training program (blacksmiths, veterinarians, jockeys) with the costs incurred paid by the owner.

8. Thoroughbred racehorses are temperamental animals and range in value from approximately $5,000 to over $50,000. These horses receive careful handling from a young age so that they develop the proper temperament for racing. The horses must not be physically or mentally overexerted during the training program. Consequently, trainers must be careful who exercises the horses during the training period. Although taxpayer tried to and did retain people to work for him on a regular basis, he occasionally needed and obtained the services of other persons on an irregular basis, to exercise or walk horses.

9. The daily training program starts before dawn with a careful feeding that will permit strenuous exercise.

10. To condition a horse for racing, the trainer plans a program which gives the horse some exercise every day. The exercise is in the form of a "walk," a "gallop," or a "work."

11. A "walk" involves leading a horse at a slow pace to provide light exercise, or to relax ("cool") a horse gradually after strenuous exercise or racing. A "walk" is performed by a person called a "hotwalker" or by a hotwalking machine.

A hotwalking machine has metal arms to which a horse's halter is attached and which leads the horse in a circular path. The hotwalking machine was used only at Laurel (Maryland) Race Course and could not be used when it rained.

12. Exercise riders are used to "gallop" or "work" racehorses. A "gallop" is the running of a racehorse on a track at half speed for various distances up to 2 miles. A "work" is the running of a racehorse at a fast speed over varying distances which are shorter than the gallop distance. The trainer tells the exercise rider to work the horse at varying speeds at different places on the track and to ride a given distance in a specified number of seconds. The trainer also determines when a horse should be run in company (side-by-side with another horse) or when to "pony" the horse (led around the track by another horse).

13. The temperament of a thoroughbred racehorse requires a skillful and experienced rider to successfully execute the trainer's orders in the prescribed exercises. The rider's range of discretion is narrow and limited to the common sense judgment of recognizing (if or when the trainer fails to) when a prescribed exercise should be discontinued because of indications of illness or injury of the horse.

14. The trainer plans a week to a month in advance precisely how a particular horse is going to be trained. Individual differences among trainers and distinctive qualities of each horse necessitate the instructing of exercise personnel on how each horse is to be handled. The free-lancer's unfamiliarity with any given horse and its trainer's modus operandi requires the trainer to give him closer supervision and attention than a regular exercise rider would need.

15. The racetrack is available for exercising horses for a short period every day—usually from daylight until 10:30 a.m.—and all exercise people must perform their work with the horses during that time. Exercisers working for a trainer on a regular basis are expected to report to the stable each morning at a particular time. Those working for the trainer on an irregular basis must also normally make a definite time arrangement for their ride or rides. Sometimes the free-lancer is retained shortly before the exercise.

16. Taxpayer, like most trainers, normally goes to the racetrack to observe while his horses are being exercised. Each trainer has a special place on the track from which he observes his exercise personnel work the horses, which place is known by his riders. At Laurel, the taxpayer stands at the end of the track nearest to his barn. His exercise people pass by him on the way to exercise the horse and usually at least once again during the course of the exercise, depending on the type of exercise the trainer instructed. The trainer may give the exerciser general instructions (such as gallop slowly for several laps around the track) or specific instructions (such as run 5/8 mile in 1 minute and 2 seconds).

17. To perform the trainer's instructions, exercisers must be skillful riders. They must be good judges of the pace and speed at which a racehorse is running an exercise.

18. In addition to their presence on the track during the exercising of horses, trainers often accompany the horse and the exercise riders to the track, giving instructions in accordance with weather and track conditions. Trainers thoroughly know the abilities and condition of their horses and give the exercise riders instructions accordingly.

19. If something appears to be wrong with the horse during its exercise, the rider is expected to react promptly to the difficulty (such as terminating the exercise when necessary) and to report all problems to his trainer. Continuing the exercise of a racehorse that may have an incipient injury may cause irreparable harm to the racehorse.

20. If and when the need arises, the trainer gives last-minute instructions to his riders as they pass his observation place on the track immediately before the exercise. During the actual exercise, while the horse is in motion, it is possible but improbable and unusual for the trainer to give additional instructions. It is possible for the trainer to direct an exercise rider to go faster or slower during the course of the exercise. Although it is uncommon that instructions are given to exercise riders when a horse is in motion, all the exercise riders who were examined in this case acknowledged that in their experience a trainer on occasion has given additional directions after the exercises were begun.

21. The trainer (taxpayer herein) had both the right and

the opportunity to control the manner and means by which an exercise rider (regular or free-lance) did his work.

22. Taxpayer had the right to terminate an exercise rider's services while he was on the horse and engaged in the exercise, although this was concededly difficult, if not impossible, to do in certain types of exercise.

23. Exercise riders frequently work for one trainer on a regular basis for a fixed salary that often includes benefits. During the third quarter of 1972, taxpayer used the services of one exercise rider (Donny Miller) on a regular basis. Taxpayer considered Miller an employee and his status is not in question.

24. Free-lance exercise personnel normally try to establish and maintain a regular employment relationship with one particular trainer at a given racetrack.

25. If taxpayer decided to run two or more horses together, he would hire extra exercise riders to accompany Miller. Extra or free-lance exercise riders were also hired when there were no regular exercise riders available. During the third quarter of 1972, Harry Stauffer, Herman Amos and Larry Eversole were used by plaintiff on an irregular and impermanent basis as exercise riders. It is their employment status which is in issue in this case.

26. During the taxable period in question, taxpayer also used the services of hotwalkers (both on a regular and an irregular basis). The irregular hotwalkers are known as free-lance hotwalkers. The employment status of two such free-lance hotwalkers (Ralph Anderson and Joseph Thomas) is in dispute here. Their services were used by plaintiff during the time in issue. Neither of these individuals testified—their whereabouts were unknown.

27. Free-lance exercise riders are either looking for a trainer to hire them on a steady basis, or working for more than one trainer each day. A free-lance exercise rider may have a regular afternoon job, perhaps at the racetrack, and may make arrangements with a particular trainer to exercise horses for that trainer in the morning to make extra money. Although a free-lance exercise rider may work for more than one trainer, he usually works on the same horses every day with a definite arrangement that he will be available at a certain time.

28. Taxpayer compensated both his regular and free-lance exercise personnel on the basis of the number of horses exercised. He also provided extra compensation to his regular employees in the way of vacation pay, Christmas bonus, and shares in the "stakes" being a division of the trainer's share of the winnings of a racehorse between himself and his regular employees. None of such extra compensation was paid by plaintiff to free-lance personnel.

29. Of the three exercise people whose status is in question, only Harry Stauffer testified at the trial. Stauffer had been riding horses for over 20 years, having been a jockey from 1953 to 1963, and an exercise rider since that time. He has worked at racetracks throughout North America.

30. On July 1, 1972, taxpayer paid Harry Stauffer $24 for riding eight horses. After the social security deduction, Stauffer's check was for the net amount of $22.90.

31. Stauffer kept a complete record (or diary) of all the trainers for whom he rode and the number of horses he rode each day he worked. Miller (the regular exercise rider) kept a similar record for the number of horses he rode for taxpayer each week. Stauffer was paid at the going rate of $3 per ride. Stauffer used his diary to aid him in collecting the amounts due him.

32. Stauffer considered himself an independent rider since he himself determined for whom and when he would work. If he did not wish to work, or if he did not like the trainer for whom he had worked, he would refrain from offering his services. Stauffer would try, at the beginning of each racing meet, to find a trainer for whom he could work on a steady basis. His diary demonstrates this by showing that he did work for certain trainers on an almost daily basis—riding horses for the same trainers day after day. In August 1972 Stauffer was riding as many as 11 horses a day for one trainer. Around October 23, 1972 Stauffer began riding horses almost exclusively for trainer John Tommaro and continued doing so through the end of the year. Tommaro withheld the Federal employment taxes from Stauffer's pay.

33. While working for trainers on an irregular basis, Stauffer received no shares in stakes, no Christmas bonus, and no paid vacations. He vacationed and worked whenever he

pleased. He was paid solely on the basis of the number of horses he rode, and he did not receive a weekly salary or a minimum guarantee.

34. The other two free-lance exercise riders (Herman Amos and Larry Eversole) worked for taxpayer when his regular exercise rider was unavailable and when taxpayer wanted to exercise two or three horses together. They were paid solely for horses ridden.

35. Taxpayer employed a regular hotwalker (Joseph Johnson), who did share in the stakes when a horse won a race and also received a Christmas bonus. Taxpayer considered Johnson to be his employee. Johnson worked for taxpayer at both the Delaware and Laurel racetracks.

36. Free-lance hotwalkers Anderson and Thomas worked for taxpayer on a fairly steady basis, each for one week in the period of time in issue. Each also walked horses for other trainers while performing services for plaintiff. Anderson received a total payment of $33 from plaintiff on July 8, 1972. At a rate of $1 to $3 per walk, Anderson walked between 11 and 33 horses during that week. Thomas received a total payment of $24 from plaintiff on August 12, 1972. At a rate of $1 to $3 per walk, Thomas walked between 8 and 24 horses for taxpayer that week. These were the only amounts taxpayer paid these hotwalkers during 1972. They did not accompany taxpayer when he transferred from Delaware to Laurel in late August. Taxpayer considered them transients and not regular employees.

37. Hotwalkers need no special skills. They are under the control of the trainer or his other employees in performing their tasks.

38. On Friday or Saturday of each week taxpayer paid all of his personnel (grooms, exercise people, hotwalkers and others) at the same time, whether they were working for him on a regular or irregular basis. He paid by check in order to have a record of the payment and he paid on certain days each week for his own administrative convenience.

39. Taxpayer deducted amounts from the weekly paychecks of his regular employees if they failed to appear for work. The regular exercise rider (Miller) kept a record of the number of horses he worked and he was paid once a week on that basis during the period in issue. Subsequently,

Miller was provided a guaranteed minimum wage not entirely predicated on the number of horses he rode.

40. Taxpayer reported the individuals in question as employees on Form 941 in accordance with Rev. Rul. 72–155 which required payment of employment taxes on free-lance exercise riders and hotwalkers.

41. Another free-lance exercise rider (Richard Kline) worked for taxpayer when the regular exercise rider was on vacation. Kline reported for work every day and was paid for the number of horses he rode for taxpayer. Kline worked on a steady basis for another trainer at the same time. During the trial, taxpayer waived any claim for refund with respect to Kline on the ground that Kline performed regular services as an exercise rider.

42. Charlotte Eaton (another exercise rider who testified) stated that she considers herself to be a free-lancer. She worked for two trainers on an almost daily basis, and was expected to report to their barns every day.

43. Exercise personnel, whether regular employees of a particular trainer or free-lancers, received the same kind of instructions for the exercising of the taxpayer's horses, except that the instructions to a free-lancer were more detailed and precise since he might not be as familiar with a particular horse.

44. There is general belief among horse trainers and the free-lance exercise riders and hotwalkers that such parties do not have the employer/employee relationship. Such belief is based primarily on the irregularity and impermanency of their relationship. In light of all of the facts and circumstances, this belief is of no significance in the application of the common law test.

45. Taxpayer had no general objection to his regular exercise rider or hotwalker working for other trainers, but did expect them to complete their work for him before performing services for others.

46. The Maryland Division of the National Horsemen's Benevolent and Protective Association (HBPA—an association of owners and trainers who race in Maryland) has a plan of benefits for trainers and their employees, but this plan does not cover free-lancers. However, free-lancers can and do receive assistance from the Maryland Horsemen's Assistance

Fund (established by state law) which provides financial aid in circumstances of necessity to anyone connected with racing. The program is administered by HBPA. The majority of thoroughbred racehorse owners and trainers belong to the HBPA, which represents them in various capacities. The HBPA will first try to have an injured free-lancer covered by the trainer's workmen's compensation policy. Taxpayer did have free-lancers covered as employees under his workmen's compensation policy. When the workmen's compensation policy does not cover the injured free-lancer, the HBPA determines whether it will provide benefits under its program. When Harry Stauffer (a free-lancer) was injured in 1972, all his medical bills were paid by the HBPA. He also received a small subsistence payment from the organization.

47. The trainer generally carries the risks of personal injury for those who work with horses under his supervision. The financial risk of personal injury from working with a racehorse is not a burden assumed by the free-lancer.

48. The employment relationship of a professional jockey to a trainer is not in issue in this case.

49. Before a horse can be raced in competition the services of a capable jockey must be engaged. This is an important decision that the owner normally leaves to the more expert knowledge of his trainer. The owner and the trainer play no significant role in the actual race. Usually the trainer selects the jockey by negotiating with the jockey's agent. The jockey is generally paid a basic fee of $30 per race plus 10 percent of the purse for a win. When a jockey first rides a horse in a race, the trainer explains in advance how the particular horse likes to run and describes the horse's peculiarities and characteristics. The trainer may also suggest what he thinks is the best way to ride the horse. If a jockey already has ridden a horse several times, the trainer's advisory role for subsequent races is usually diminished or ended. Sometimes a jockey is retained by a trainer under contract to ride various horses in various races over a period of time.

50. The jockey has total control over the horse during the race. How the horse will run the race is for determination by the jockey in the exigencies of the contest. The jockey must react to circumstances which may unexpectedly arise once

the race has begun, and he is expected to use his best judgment and skill to overcome any problems and to win the race.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS

51. Taxpayer had the right to exercise control and did exercise control over the free-lance exercise riders in issue regarding the manner and means by which they performed their services.

52. Taxpayer had the right to exercise control and did exercise control over the free-lance hotwalkers in issue regarding the manner and means by which they did their work.

53. The free-lance exercise riders in issue performed services for taxpayer as employees, not as independent contractors.

54. The free-lance hotwalkers in issue performed services for taxpayer as employees, not as independent contractors.

55. Plaintiff is not entitled to recover the withholding and FICA taxes paid with respect to the free-lance workers in issue for the third quarter of 1972.

CONCLUSION OF LAW

Upon the foregoing opinion and findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and the petition is dismissed.

NORMAN C. MURPHY v. THE UNITED STATES

[No. 216–73. Decided April 14, 1976]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Military pay; resignation.—Plaintiff, a former Lieutenant in the Air Force Reserve, seeks active duty pay and allowances, retirement benefits and correction of his military records, claiming administrative impropriety in that the indorsing command recommended to the Secretary of the Air Force that resignation be allowed under AFR 36–12, para. 16m, whereas plaintiff had referred to para. 62; that the Air Force violated applicable procedural regulations in permitting him to resign under any provision of AFR 36–12 since

Syllabus

he had not completed his initial tour of obligated active duty; that acceptance of his tender of resignation should be voided because based on an illegal or "false" indorsement and in consonance with the action voiding an Officer Effectiveness Report; and that his resignation was the product of coercion and duress. For the reasons discussed, it is *held* that plaintiff is not entitled to prevail, plaintiff's motion for summary judgment is denied, defendant's cross-motion is allowed, and the petition is dismissed.

Military pay; administrative practice and procedure; resignation.

[1] To sustain recovery based upon administrative impropriety, a plaintiff must demonstrate the manner in which he has been prejudiced thereby. Where plaintiff tendered his resignation "from all appointments" in the Air Force, listing AFR 36–12, para. 62, as authorization, a change by the indorsing command to authorization under para. 16m to harmonize the regulation with the narrative substance of the tender of resignation does not convert plaintiff's resignation to an involuntary one.

Armed Services ⟸ 9

Military pay; resignation from military service; when effective.

[2] Acceptance of plaintiff's tender of resignation and discharge prior to the end of his initial obligated active service were not violative of directives relating to active-duty service requirements where AFR 36–12, para. 14(a), in force at the operative time, provided that where unusual circumstances exist tenders of resignation could be submitted for special consideration. A serviceman does not have a right per se to remain in service until expiration of his enlistment.

Armed Services ⟸ 9

Military pay; resignation from military service; when effective.

[3] Although an unfavorable Officer Effectiveness Report was voided for technical defect in that it indicated plaintiff's overall evaluation to be unsatisfactory and yet the narrative comments showed his overall performance to have been better, plaintiff's tender of resignation bearing indorsement by his superior expressing opinion that in the best interest of the service plaintiff's resignation should be accepted and containing language somewhat similar to that of the OER but not containing the said technical defect and not referring to the OER itself, is not invalid on the ground that the tender was accepted based upon an allegedly tainted indorsement. An indorsement to a resignation is not an OER and is not subject to the stringent procedures applicable thereto.

Armed Services ⟸ 9

Military pay; resignation; duress; what constitutes.

[4] To make out a sufficient case for avoidance of administrative action on the ground of duress, plaintiff must demonstrate that one side involuntarily accepted the terms of another, that circumstances permitted no other alternative, and that the circumstances were the

Opinion of the Court

result of coercive acts of the opposing party. Assuming plaintiff's superior presented him the choice of either resigning or being faced with the reopening of a 35–62 security investigation, this does not constitute duress since plaintiff need not have resigned but could have stood firm and opposed the investigation.

Armed Services ⚖ 9

David F. Krone, attorney of record, for plaintiff.

Gerald L. Schrader, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before SKELTON, NICHOLS, and BENNETT, *Judges*.

BENNETT, *Judge*, delivered the opinion of the court:

In this military case plaintiff asks us to void the action of the Secretary of the Air Force in accepting his tender of resignation, which was submitted on May 26, 1967, and finally approved effective July 31 of the same year. Plaintiff was honorably discharged. He asserts that the Air Force violated applicable procedural regulations but, fundamentally, that coercion and duress practiced upon him by his commander induced him to resign against his will. For the reasons discussed below, we conclude that the plaintiff's motion for summary judgment should be denied and the cross-motion of defendant United States for summary judgment should be allowed. The petition is dismissed.

Prior to the effective date of his resignation, plaintiff was a first lieutenant in the United States Air Force Reserve. Plaintiff had been awarded a commission as a second lieutenant upon successful completion of training in Officer Training School on November 10, 1965. Thereafter, he enrolled in a course of navigator training which he did not complete, electing to seek "self-initiated elimination" for personal reasons.

Plaintiff's most serious difficulties with the Air Force awaited him at his next duty station. Detailed to a satellite activity of the 1100th Air Base Wing located at Travis Air Force Base, California, plaintiff embarked upon what he hoped would ultimately become a strong administrative specialty as an Armed Forces Courier Service officer. Such courier officers commonly are assigned to effect timely and

secure transportation of classified material among units of the armed forces. We gather from the affidavit and exhibits before us that plaintiff needed a top secret security clearance for this assignment. During the course of 1966 and the early months of 1967, several facts came to the attention of his local command which called into question his fitness to serve as a courier officer. In 1966 plaintiff, while in charge of a detail receiving a shipment of classified material, temporarily misplaced a confidential registered package. Although the package was promptly located, plaintiff received a letter of reprimand. In January of 1967 plaintiff was found by armed forces police in an "off-limits" establishment in San Francisco known as the "99 Club." The police report recites that the premises had been placed off limits for "homosexual/prostitution activities and unsanitary conditions." When asked the reason for his presence plaintiff is said to have replied that he liked to frequent "off-beat" establishments.[1] The report was addressed to the attention of plaintiff's local command. Additionally, in May of 1967 accusations were leveled against plaintiff by an airman involving alleged homosexual advances. The record indicates that an article 35–62 investigation followed, but was dropped when it developed insufficient evidence to warrant further personnel action. The accuser was subjected to a bad conduct discharge in June 1967 for reasons not here relevant. Finally, plaintiff took it upon himself to advise another airman concerning the nature of conscientious objection to the Vietnam conflict. Plaintiff admits this much, but denies that he ever advocated such a philosophy himself. He was also said to have expressed views about marijuana which were unacceptable to his superiors.

Because of these circumstances, the Armed Forces Courier Service detachment ended plaintiff's tenure as a courier officer, and effected his transfer on a loan basis to the host

[1] Plaintiff's affidavit in support of his motion for summary judgment and in opposition to defendant's motion, states: "It is true that I occasionally asked persons about their homosexual experiences. But, I never invited or encouraged such behavior. Had I done so, I am sure I would have been jailed instantly, what with all the investigation into my background. In fact, I had done my undergraduate thesis on homosexuality. After the Air Force, I did my doctorate dissertation on inherited biological traits that influence homosexual behavior."

command at Travis Air Force Base, the 60th Air Base Group, Military Airlift Command (MAC). It is at this point that plaintiff first encountered a Lieutenant Colonel Pond, the commander in charge of the headquarters squadron of the 60th Air Base Group. Lieutenant Colonel Pond utilized plaintiff as a general administrative assistant for the remainder of his active duty period in the Air Force. Plaintiff claims he was given demeaning assignments designed to punish him for unorthodox views and to encourage him to quit and that he was the subject of malicious gossip. He required the help of a psychiatrist to overcome these problems.

Plaintiff's affidavit tells us that during the time he served under Lieutenant Colonel Pond he was interviewed three times by that officer relative to his future in the Air Force. At the first of these meetings Colonel Pond gave him "a very strong suggestion" that he should resign his commission. Plaintiff says that he was greatly distressed and that in a fit of despair he did submit an informal letter of resignation. Colonel Pond would not accept the letter since it was not in the form specified by the applicable Air Force regulation, AFR 36–12. Pond showed plaintiff the proper form, citing AFR 36–12, paragraph 16m, as authority for discharge.[2] Plaintiff did not comply with this suggestion in the immediately following weeks, hoping still to salvage his military career. During this period plaintiff tells us that he executed his duties with a renewed determination to vindicate himself by hard work and came to entertain a guarded optimism concerning his continuing on active duty.

These hopes were shattered once and for all, we are told, when Colonel Pond, during the third interview,[3] advised plaintiff that if he did not submit his resignation as de-

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[2] This regulation, as then in force, provided in part:

"m. *Other Miscellaneous Reasons.* * * * [O]fficers who are not eigible to tender their resignations under any criteria contained in * * * [other subparagraphs of paragraph 16, AFR 36–12] may tender their resignations under this paragraph, if they can establish that their separation from the service will be in the best interest of the Air Force. Each resignation tendered under this paragraph will be considered on the individual merits of the case and normally will not be approved unless it is established that separation of the officer will be in the best interest of the Air Force. * * *."

[3] Plaintiff's affidavit does not indicate what occurred during his second meeting with Lieutenant Colonel Pond.

manded, an investigation under Air Force Regulation 35–62 [4] would be renewed. Plaintiff speaks of a serious decline in his health, together with great personal anxiety attendant upon this downturn of events. As stated, plaintiff's tender of resignation is dated May 26, 1967. Plaintiff used the form pointed out to him previously, changing only the authority for his resignation from paragraph 16m of AFR 36–12 to paragraph 62.[5]

Pertinent parts of the letter of resignation state:

> 1. I, 1/Lt Norman C. Murphy, FV3153617, under paragraph 62, AFR 36–12, hereby voluntarily tender my resignation from all appointments in the United States Air Force.
>
> 2. The reasons for the submission of this resignation are as follows:
>
> * * * * * * *
>
> c. * * * Although I understand that, at this time, no action has been initiated under any Air Force regulation for my dismissal, I feel that the long standing investigation regarding a security clearance has severely prejudiced my career and may well continue to do so in the future. Therefore, I believe it in the best interests of both the Air Force and of myself that this resignation be accepted.

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[4] AFR 35–62 of August 11, 1965, paragraph 3a, provides, in part:
"3. POLICY:

"a. No person will be * * * retained in a military status in the Air Force if his * * * retention is not clearly consistent with the interests of national security. In order to maintain the effectiveness of the Air Force, prompt action must be taken to insure that no person is * * * retained in the Air Force who lacks the security qualifications necessary for membership in the Air Force."

Paragraph 8a of the same regulation states that when facts come to the attention of an officer's parent command indicating a potential security risk, the commander with clearance authority is to forward a request for investigation to the Office of Special Investigations (OSI).

[5] Paragraph 62 of AFR 36–12 differs from paragraph 16m in that the former provides only for release from extended active duty in the best interests of the Air Force, while the latter provides for outright resignation of all appointments. *See* note 2, *supra*. Paragraph 62 reads as follows:

"62. *Release for Other Miscellaneous Reasons.* Officers who are not eligible for release under any other criteria contained in this regulation may apply for release from extended active duty under this paragraph.

"a. Applications will be approved only if it is established that release of the officer will be in the best interests of the Air Force.

"b. Applications will not be approved in any instance where the records indicate that elimination action under any other regulation is appropriate. (SDN 610)."

> 3. I understand that, if this resignation is accepted, I will be honorably discharged from all appointments held by me.

Lieutenant Colonel Pond, in an undated endorsement to plaintiff's foregoing tender of resignation, recommended approval of it, saying of plaintiff:

> * * * He is of high intelligence but extremely naive. He has an outstanding ability to Staff but none to command. He entertains extremely liberal ideas and therefore is unable to lead. He is unable to gain the respect of his superiors or his subordinates. I do not recommend him for an Air Force career and believe it would be in the best interest of the USAF to release him at this time.

Colonel Pond continued by commenting that he had 8 months in which to observe plaintiff's performance of duty and, while commending plaintiff on work assignments requiring minimum contact with others, lamented his lack of courtesy, discretion, and general attitude. He said that plaintiff disrupted work progress and caused personnel friction, interfered in matters that were not his concern, alienated all who came in contact with him, caused department heads to request that they be relieved of him, and entertained ideas and beliefs not consistent with the officer image. "His mannerisms and ideas have raised many questions by other officers at all levels, as to his suitability in the officer corps."

It is significant to note before going further that on June 6, 1967, Colonel Pond also submitted an Officer Effectiveness Report (OER) for plaintiff covering the period between January 27, 1967, and June 5 of the same year. In the "comments" section of that report Pond included remarks quite similar to the recitals he had used earlier on the first endorsement of plaintiff's tender of resignation.[6] Notwithstanding the reporting official's narrative comments that in certain areas not requiring work with others plaintiff's performance was outstanding, the entry in the "over-all evaluation" section is marked as "unsatisfactory." Upon recommendation of the Air Force Board for Correction of Military Records,

[6] While the endorsement was undated, the record supports the inference that it was completed and sent to higher authority within the chain of command between May 26, 1967 (date of tender) and June 6, 1967 (date of second endorsement).

the Secretary of the Air Force by memorandum dated August 13, 1970, ultimately voided and removed this OER from plaintiff's record because of the fatal inconsistency between the overall unsatisfactory evaluation and the narrative comments recognizing outstanding performance in certain aspects of plaintiff's duties. Thus, we will be called upon to judge the significance of the fact that some wording from a voided OER was included on an endorsement to the tender of resignation, which resignation was finally allowed.

Returning momentarily to the time of plaintiff's resignation, plaintiff attaches some importance to the fact that the command which added a fourth endorsement and forwarded his tender to the Secretary of the Air Force recommended that it be approved not under paragraph 62, as requested, but under paragraph 16m of AFR 36–12. It is evident that this recommendation was accepted, as plaintiff's report of discharge, form DD 214, cites paragraph 16m of the applicable regulation as authority. We do not think it open to serious doubt that the command attaching the fourth endorsement appropriately changed the paragraph from 62 to 16m, since the wording of plaintiff's tender of resignation asked for "resignation from all appointments in the United States Air Force," and not simply for release from extended active duty.[7]

Plaintiff's resignation, effective July 31, 1967, occurred less than 2 years from the date of his commission as a reserve officer, and more than 2 years prior to the expiration of his 4 years of initial obligated active service. Plaintiff tells us that he has taken his grievances before the Air Force Board for Correction of Military Records no fewer than four times, although the record before us contains the proceedings of only two such appearances. As hereinbefore noted, plaintiff did manage to convince the board that one OER should be voided. All other requests for relief were denied, including plaintiff's bid for back pay and allowances for which he now brings this suit.

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Plaintiff's first theory of liability originates with the action of the command which attached a fourth endorsement to

[7] *See* note 5, *supra*.

his tender of resignation. As previously noted, at this stage it was noticed that plaintiff had asked that he be permitted to resign "from all appointments" in the Air Force, listing AFR 36–12, paragraph 62, as authorization. Since paragraph 62 does not authorize resignation from all appointments, but merely release from extended active duty, the endorsing command recommended to the next level (the Secretary of the Air Force) that resignation be allowed under paragraph 16m.

Plaintiff states that at the instant authorization for separation was changed from paragraph 62 to paragraph 16m, his resignation by operation of law became "involuntary." He analogizes his tender of resignation to an offer to enter a unilateral contract, which offer could be accepted by the offeree only by effecting his resignation (or release from active duty) upon precisely the terms embodied in his offer. As an afterthought in his reply to defendant's cross-motion for summary judgment plaintiff adds the observation that an "involuntary" resignation, such as his, must be processed under other paragraphs of AFR 36–12 with opportunity for hearing and other safeguards.

We do not agree that plaintiff's discharge became involuntary simply because an unknown administrative officer at a higher level in the chain of command changed the authorization reference from one paragraph to another, where this correction of an apparent clerical error obviously was calculated not to work any hardship or forfeiture on plaintiff, but merely to harmonize the regulation cited with the narrative substance of his tender of resignation. In short, plaintiff got what he asked for—"resignation from all appointments in the United States Air Force."

Even if we were willing to say that plaintiff's first theory has some legal merit, recovery would not follow. To sustain a recovery based upon administrative impropriety a plaintiff must demonstrate the manner in which he has been prejudiced thereby. *Hart* v. *United States*, 204 Ct. Cl. 925, *cert. denied*, 419 U.S. 1049 (1974); *Haynes* v. *United States*, 190 Ct. Cl. 9, 418 F. 2d 1380 (1969); *Cohen* v. *United States*, 177 Ct. Cl. 599, 369 F. 2d 976 (1966), *cert. denied*, 387 U.S. 917 (1967). Had plaintiff been released from active duty,

rather than resigning from all appointments, he still would not have been entitled to pay and allowances after the date of his release.

Plaintiff's first contention must be rejected.

II

Next, plaintiff argues that the Air Force violated applicable service regulations in permitting him to resign under *any* paragraph of AFR 36–12, since he had not completed his initial tour of obligated active duty. It is undisputed that at the time plaintiff accepted his commission, he incurred a 4-year active duty commitment. The 4-year period would have expired on November 9, 1969, or more than 2 years after the effective date of his resignation.

On this point we agree with the defendant. Under paragraph 14(a) of AFR 36–12, as in force at the operative time, in cases such as this one, tenders of resignation could be submitted for special consideration notwithstanding the active-duty service requirements set out in other directives.[8] Additionally, it is settled that "[a] serviceman does not have a right per se to remain in service until the expiration of his enlistment." *Birt* v. *United States*, 180 Ct. Cl. 910, 913 (1967); *McAulay* v. *United States*, 158 Ct. Cl. 359, 305 F. 2d 836 (1962), *cert. denied*, 373 U.S. 938 (1963). In the case at bar, the Air Force committed no error in discharging plaintiff prior to the end of his initial obligated active service.

III

Plaintiff also asserts that the Secretary's action in accepting his tender of resignation must be voided, because it was taken on the basis of Lieutenant Colonel Pond's undated first endorsement. We have heretofore noted that an OER filed at about the same time by Colonel Pond, and which contained language in some respects similar to that which found its way into the endorsement, was declared null and void in 1970 by

[8] "a. *Time Limitations.* To preclude unanticipated and unprogrammed loss of trained personnel, officers who desire to tender their resignations under paragraph 16 * * * *m* may do so *only* within the time limitations specified below, to be effective as indicated. Exceptions may be made *only* when unusual circumstances exist which would warrant submission of resignations for special consideration."

the Secretary of the Air Force upon recommendation of the Air Force Board for Correction of Military Records. Plaintiff maintains that since the OER is void, so, too, is the endorsement and the Secretary's action taken thereon.

Discovery of the legal meaning of these facts requires reference to *Hankins* v. *United States*, 183 Ct. Cl. 32 (1968). In that case an Air Force medical administrative officer, a career regular Air Force officer, tendered his resignation, allegedly due to coercion and pressure of two superiors. When the two officers rotated to new duties at other stations, the source of pressure disappeared and plaintiff by letter sought to withdraw his tender of resignation prior to its final acceptance. Unfavorable OERs had been filed against Hankins while serving under the officers who later departed from his station. Officials in the chain of command forwarding his request to withdraw the resignation recommended disapproval in light of these unfavorable OERs, thus standing by initial recommendations in favor of plaintiff's resignation. The plaintiff was ultimately discharged over his objection in accordance with his original tender of resignation.

In administrative proceedings the Air Force Correction Board agreed that the OERs were unjust and should be stricken, but nevertheless declined to authorize Hankins' reinstatement. This court held that the Correction Board's action in refusing reinstatement while striking the OERs was arbitrary and unfounded. 183 Ct. Cl. at 38. The court entertained the view that where an administrative decision (in that case, refusal of a request to withdraw one's resignation) rests significantly upon improper material (unjust OERs, later relied upon in unfavorable endorsements), it may not be permitted to stand. *Id.*

Hankins is somewhat akin to the instant case, for in both controversies approval of a resignation request over allegedly tainted endorsements is attacked. But, that is where the parallel ends. In *Hankins* the endorsements recommending disapproval of plaintiff's bid to withdraw his resignation referred specifically to OERs *themselves*, which were subsequently voided by the Correction Board because they "graded him unjustly and far too low." 183 Ct. Cl. at 35. In this case, however, the endorsement did not refer to an OER itself which later was voided. The undated first endorsement

expressed sentiments reflected in the OER. However, such language did not contain the technical defect which later induced the Correction Board to void the effectiveness report. The board did not consider at all whether the narrative remarks therein were true or false. The OER was voided because in block V, Over-all Evaluation, an "x" appears in the space marked "unsatisfactory," while narrative comments in block VII showed plaintiff's overall performance to have been better. On the other hand, the undated first endorsement to plaintiff's resignation request is not an OER or subject to the stringent procedures applicable thereto. The issue in the endorsement is not whether for OER purposes an officer's performance is totally unsatisfactory; the question is solely that of whether, in the writer's opinion, plaintiff's resignation offer ought to be accepted by the Secretary in the best interests of the Air Force. In our view, comparing an endorsement to an OER is like comparing apples and oranges, unless the endorsement merely incorporates the defective OER by reference and recommends disapproval of a request to withdraw one's resignation, as in *Hankins*. In the case at bar the endorsement does nothing more than to list Colonel Pond's personal opinion as to whether in the best interest of the Air Force, plaintiff's resignation should be permitted. We do not think he can be faulted for that. Accordingly, we decline to void plaintiff's discharge on the ground that his tender of resignation was accepted based upon an illegal or "false" endorsement.

IV

Finally, plaintiff complains in an affidavit that his resignation was the product of coercion and duress, and, as such, a legal nullity. His petition refers to "mental distress." His brief says that he was "bullied out" by Lieutenant Colonel Pond. We think that, reading the record as a whole, this assertion is of the essence to plaintiff's claim even though his counsel has not chosen to brief the issue separately and distinctly from the other problems present in this case.

To make out a sufficient case for the avoidance of administrative action on the ground of duress, plaintiff must demonstrate the existence of three elements:

> * * * (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. * * *. [*Fruhauf Southwest Garment Co.* v. *United States*, 126 Ct. Cl. 51, 62, 111 F. Supp. 945, 951 (1953).]

Although these rules first found expression in this court in a contract case, we have applied them time and again in back pay controversies. *E.g.*, *Dounias* v. *United States*, *post* at 688; *Christie* v. *United States*, 207 Ct. Cl. 333, 518 F. 2d 584 (1975); *Leone* v. *United States*, 204 Ct. Cl. 334 (1974); *Dorl* v. *United States*, 200 Ct. Cl. 626, 633, *cert. denied*, 414 U.S. 1032 (1973).

Construed in the light most favorable to plaintiff, we do not think that the facts placed before us in plaintiff's affidavit demonstrate that, objectively speaking, plaintiff had no alternative other than to resign his commission. On the contrary plaintiff could have stood firm and opposed the security investigation with which he says Colonel Pond threatened him. He still maintains that all accusations of wrongdoing against him were false. In these circumstances, a claim of duress cannot be sustained.

In summary, plaintiff's resignation did not become involuntary nor was there a violation of regulations merely because the paragraph of AFR 36–12 under which he was discharged differed from the one he cited in his tender of resignation. Plaintiff suffered no legal injury and demonstrates no monetary prejudice from this clerical adjustment to conform to the reality of his request to resign "from all appointments in the United States Air Force." The Secretary of the Air Force did not err in permitting plaintiff to resign before the expiration of his initial active duty obligation since exceptions for unusual circumstances permit such resignations and plaintiff described such circumstances in what he called at the time his voluntary resignation, heretofore quoted. The Secretary's acceptance of plaintiff's resignation was not voided retroactively when the Correction Board decided to remove plaintiff's OER covering the period between January 27 and June 5, 1967, for reasons unrelated to plaintiff's fitness to serve. Finally, plaintiff has not demonstrated the presence of legally actionable duress in the matter

Syllabus

of his resignation, an issue raised for the first time in this petition filed 6 days short of the expiration of the statute of limitations and more than 4 years after he attempted to withdraw his tender of resignation. Because of these conclusions we find no occasion to rule on defendant's alternative positions that the claim is barred by laches and estoppel, or on other issues raised by plaintiff. The plaintiff's motion for summary judgment is denied. Defendant's cross-motion for summary judgment is allowed. The petition is dismissed.

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534 F. 2d 252

EASTMAN KODAK COMPANY v. THE UNITED STATES

[No. 517-71. Decided April 14, 1976]

OPINION

Taxes; income tax; deductions; payroll tax expenses; "all events" test.—Plaintiff is an accrual basis taxpayer using calendar year reporting periods. On audit of plaintiff's 1964 Federal income tax return, the Internal Revenue Service determined that plaintiff had improperly deducted in that year liability for payroll taxes (under the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and state unemployment tax statutes) on certain employee compensation paid in 1964, i.e. "year-end" wages, bonuses and vacation pay, contending that the said deductions did not meet the "all events" test because the liability for the payroll taxes did not attach until the compensation was paid in 1965. Plaintiff paid the assessed deficiencies, filed a refund claim, and upon disallowance filed the present action for refund, plus interest. It is *held* that the "all events" test is the proper method for determining the deductibility of payroll taxes in 1964 and that it must be applied to each employee on an individual basis; that under said test plaintiff may deduct in its 1964 return the taxes corresponding to the "year-end" wages accrued in 1964, but may not deduct payroll taxes on accrued bonuses and vacation pay until its 1965 return; and that *Otte* v. *United States*, 419 U.S. 43 (1974), does not operate to extinguish the "all events" test in the tax area. The case is remanded to the trial division for determination of the amount of recovery, and for additional proceedings consistent with the opinion, including the extent to which, if at all, the present result creates a double disallowance of the same payroll tax items for purposes of computing plaintiff's 1964 taxable income.

Syllabus

Taxes; income tax; method of accounting; consistency in reporting.

[1] Although plaintiff consistently matched compensation and related payroll taxes in its tax accounting, it cannot assert any right to continue such treatment from the mere failure of the Internal Revenue Service to challenge such practice in past years; plaintiff must also show that the treatment was correct.

Internal Revenue ⇐ 1331

Taxes; income tax; method of accounting; business v. tax accounting.

[2] While plaintiff's method of matching wage expense and payroll tax expense may be sound from a business accounting standpoint, tax accounting differs in many material respects from business accounting. To obtain the subject payroll tax expense deductions in the year in which liability for the wages accrued rather than in the following year when the compensation was paid, plaintiff must show that tax accounting principles, not business practice, requires such treatment.

Internal Revenue ⇐ 1331

Taxes; income tax; deductions; expenses, trade or business; time for taking deductions; "all events" test.

[3] A tax which accrues in an earlier year but is not paid until the following year may be deducted in the prior year if it meets the "all events" test which looks to a liability that is so fixed that the fact of liability is certain and the amount thereof reasonably ascertainable, although not necessarily legally enforceable. The "all events" test allows deductions when the taxpayer has a special kind of knowledge which gives him enough facts to demonstrate the absolute necessity of paying an expense at some future date without regard to such matters as actual payment taking place, existence of legal liability, or accrual. (*Otte* v. *United States*, 419 U.S. 43 (1974), dealing with bankruptcy law, *distinguished*).

Internal Revenue ⇐ 573

Taxes; income tax; deductions; expenses, trade or business; payroll tax expenses; time for taking deductions.

[4] In the payroll tax area, the fact of liability is measured by considering each individual employee rather than the totality of all employees. Where plaintiff has shown that the amount of and liability for payroll tax expense with respect to the earning of each employee's "year-end" wages were fixed and certain as of the end of 1964 as an automatic consequence of the definite and legal obligation to pay said wages, the payroll taxes on "year-end" wages meet the "all events" test entitling plaintiff to deduct them in 1964, although the wages were paid the first week of 1965.

Internal Revenue ⇐ 573

Taxes; income tax; deductions; expenses, trade or business; payroll tax expenses; time for taking deductions.

[5] Where the right to receive cash bonuses vested in plaintiff's employees at the end of 1964 but the bonuses were not payable until

March 1965, the possibility that an employee might receive a pay raise during the interval between December 31 and payment of the bonus, made the fact of plaintiff's 1965 tax liability on each employee for bonuses uncertain as of December 1964, the "all events" test has not been met, and plaintiff is not entitled to deduct the bonus payroll tax expense in 1964.

Internal Revenue ⇐ 577

Taxes; income tax; deductions; expenses, trade or business; payroll tax expenses; time for taking deductions.

[6] Where, as of the end of 1964 plaintiff's employees had earned the right to paid vacations to be taken in 1965, since plaintiff could not know in 1964 whether an employee would take a vacation before or after his salary reached the 1965 ceiling applicable to the taxes at issue, under FICA, FUTA and state unemployment statutes, the "all events" test has not been met, and plaintiff is not entitled to deduct the vacation pay tax expenses in 1964.

Internal Revenue ⇐ 577

Karl R. Price, attorney of record for plaintiff. *Ivins, Phillips & Barker*, of counsel.

Kenneth R. Boiarsky, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Gilbert E. Andrews*, of counsel.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, DAVIS, SKELTON, KASHIWA, KUNZIG, and BENNETT, *Judges*, *en banc*.

KUNZIG, *Judge*, delivered the opinion of the court.

This income tax refund case comes before the court on appeal from the Trial Division where findings and an opinion were filed April 1, 1975 by Trial Judge George Willi, pursuant to Rule 134(h). His decision has been reviewed on the briefs, exceptions, and oral argument of counsel. Upon consideration thereof, the court finds itself in agreement with portions of that recommended decision and reaches essentially the same result on major sections of the case, although we base our opinion on somewhat different legal reasoning. Most of the Trial Judge's findings of fact are adopted, but with some modifications we deem proper upon consideration of exceptions by the parties.

Plaintiff and defendant contest the proper timing for plaintiff's deduction of payroll tax expenses. Plaintiff is an

accrual basis taxpayer using calendar year reporting periods. The tax expenses arose in connection with three different types of compensation payments made to plaintiff's employees in 1965: (1) "year-end" wages, (2) bonuses, and (3) vacation pay. Plaintiff attempts to deduct such tax expenses in 1964, the year that the underlying compensation obligations *accrued*. Defendant asks us to conclude that plaintiff could not deduct the tax expenses until this underlying compensation was actually paid in 1965. The classic "all events" test [1] must be applied in the instant case to determine the proper timing for plaintiff's tax expense deductions. Applying this test, we hold that plaintiff may deduct in its 1964 return those taxes corresponding to the "year-end" wages accrued in 1964, but plaintiff may not deduct payroll taxes on accrued bonuses and vacation pay until its 1965 return.

The payroll tax expenses at issue here involve Kodak's payments under the Federal Insurance Contributions Act (FICA),[2] the Federal Unemployment Tax Act (FUTA),[3] and various state unemployment taxes.[4]

The compensation paid by plaintiff which gave rise to the taxes and, thus, the tax expense deductions involved in the instant action, takes three forms. The first type is "year-end" wages. Wages earned during the last week of 1964 "accrued" as of the end of 1964, but were not paid until the first week of 1965. Kodak wants to deduct the payroll taxes on such "year-end" accrued wages in 1964.

Second, at the end of each year, plaintiff declared cash bonuses in favor of its employees. The right to receive this special compensation vested in employees at the end of 1964, but the bonuses were not payable until March 1965. Again, plaintiff desires a 1964 tax expense deduction. Since liability

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[1] "If all events have occurred which fix the amount of the tax and determine the liability of the taxpayer to pay it," a deduction is available. *United States v. Anderson*, 269 U.S. 422 (1926).

[2] Int. Rev. Code of 1954, § 3111, *as amended*, 75 Stat. 131 (1961).

[3] Int. Rev. Code of 1954, § 3301, *as amended*, 74 Stat. 924 (1960), 77 Stat. 51 (1963).

[4] Labor Law, *McKinney's Consol. Laws of N.Y. Ann.*, §§ 560, 570; *Tenn. Code Ann.*, § 50–1326; *N.J. Stat. Ann.*, § 43.21–7; *Smith-Hurd Ill. Ann. Stat.* ch. 48, § 550; Unemployment Insurance, *West's Ann. Calif. Codes*, § 976; *Vernon's Tex. Civil Stat. Ann.*, Art. 5221b–5. At the end of 1964, over 98 percent of plaintiff's employees were located in these states.

accrued in 1964, reasons plaintiff, the liability for tax should similarly accrue and yield a 1964 payroll tax expense deduction.

Third, as of the end of 1964, various of plaintiff's employees had earned the right to paid vacations to be taken in 1965. An employee's right to vacation pay vested in 1964 despite the fact that payment would not take place until the following year. Again, since plaintiff's liability for the vacation pay accrued in 1964, it would like to deduct the corresponding payroll tax expense on its 1964 return.

Both parties agree that plaintiff properly accrued and deducted the three types of compensation at the time its liability for the payments became fixed in 1964. They disagree on the proper year for deducting the payroll *tax* payments made to Government agencies as a result of the compensation payments. Plaintiff argues that its liability for all three types of compensation accrued in 1964, and the tax payments should be deducted in the same return.

The Internal Revenue Service (IRS) concluded that plaintiff was not entitled to deduct the payroll tax expense on the 1964 tax return and assessed a deficiency. Plaintiff paid the deficiency, filed a refund claim and by timely petition in this court, brought the present action after the IRS disallowed the claim.

Kodak makes a "five prong" assault on defendant's denial of the 1964 payroll tax expense deductions. First, since it consistently matched wage expense and payroll tax expense without challenge by the IRS during prior years, plaintiff claims that defendant cannot now complain of its tax accounting treatment of the payroll tax expenses. Second, Kodak contends the generally accepted principles of accounting should be adopted in this case. The payroll tax expenses which arise from the wages should be "matched" with the wages for tax accounting purposes. Third, the matching and allocation principles enumerated in *J.I. Case Co.* v. *United States*, 106 Ct. Cl. 267, 65 F. Supp. 464 (1946) are, according to plaintiff, applicable in the present case to grant it a 1964 deduction. Fourth, Kodak relies upon the "all events" test to claim 1964 deductions for the payroll taxes at issue here. Finally, plaintiff claims that it will be the victim of a

double denial of the payroll tax expenses at issue here if defendant's position is upheld.[5]

Of all five arguments, only number four, Kodak's advocacy of the "all events" test, is applicable here.

First, despite the fact that plaintiff has consistently matched compensation and the related payroll taxes in its tax accounting, it cannot assert any right to continue such treatment from the mere failure of the IRS to challenge such practice in past years. At best, plaintiff's consistency is inconclusive. *Electric & Neon, Inc.* v. *Commissioner*, 56 T.C. 1324, 1333 (1971); *Mifflin* v. *Commissioner*, 24 T.C. 973, 979 (1955). Plaintiff must show not only that its treatment of the payroll tax expenses has been consistent, but also that it is correct.

Plaintiff's second argument, that generally accepted principles of accounting favor matching the compensation and the payroll tax may be sound from a business accounting standpoint. However, tax accounting differs in many material respects from business accounting. One such area of divergence is the "matching" principle which plaintiff urges upon us in this case. *Cf. American Automobile Association* v. *United States*, 367 U.S. 687, 694–97 (1961). To obtain a deduction, plaintiff must show that tax accounting principles, not business practice, require such treatment.

We also cannot give credence to plaintiff's third argument, that the principles of *J.I. Case Co.*, *supra*, create a 1964 payroll tax deduction in this instance. In *Case* we held that the taxpayer could deduct property taxes allocable to a short fiscal year since the taxpayer's income could not otherwise be accurately reflected. However, *Case* stemmed primarily from the nature of the taxpayer's short and nonrecurring fiscal year. We do not have such a situation in the facts at bar, and hold *J.I. Case Co.* inapposite.

Plaintiff's fourth argument, that the "all events" test applies to the instant facts to give a 1964 deduction, while not technically correct in all respects, is more true to the mark. Here Kodak has hit upon the proper test, but would have us apply that test in a legally erroneous manner.[6]

[5] The double denial question is not before the court at this time. This point has been severed by the Trial Judge and held for further proceedings pending resolution of the issues currently before the court.

[6] For plaintiff's fifth argument, *see* Note 5, *supra*.

A tax which accrues in an earlier year but is not paid until the following year may be deducted in the prior year if it meets the "all events" test established by the Supreme Court in *United States* v. *Anderson*, 269 U.S. 422 (1926). If all events which determine liability and fix the amount of the tax occur before the end of the prior year, a deduction is available to an accrual basis taxpayer.

> In a *technical sense* it may be argued that a *tax does not accrue until* it has been *assessed* and becomes *due;* but it is also true that in advance of the assessment of a tax, *all the events may occur* which *fix the amount* of the tax and *determine the liability* of the taxpayer to pay it. In this respect for purposes of accounting and ascertaining *true income* for a given accounting period, the munitions tax in question here did not stand on any different footing than other accrued expenses appearing on appellee's books. *Id.* at 441. (Emphasis added).

The "all events" test has been applied frequently and regularly in this court and other jurisdictions to determine proper timing for tax expense deductions. *See, e.g., United States* v. *Consolidated Edison Co.*, 366 U.S. 380, 385 n. 5 (1961); *Clevite Corp.* v. *United States*, 181 Ct. Cl. 652, 658, 386 F. 2d 841, 843 (1967); *Turtle Wax, Inc.* v. *Commissioner*, 43 T.C. 460, 466–67 (1965); *Denver & Rio Grande Western Railroad Co.* v. *Commissioner*, 38 T.C. 557, 572 (1962). Most recently, we applied the "all events" test in *Union Pacific Railroad Co.* v. *United States*, 208 Ct. Cl. 1, 524 F. 2d 1343 (1975).[7] We held that the test applied to determine deductibility of payroll taxes, similar to those in the instant case, which stemmed from accrued vacation pay. In *Union Pacific* we concluded that plaintiff was not entitled to deduct payroll taxes in the earlier year because "all events" fixing liability for the tax had not occurred in this prior year. *It must be reemphasized that we used the "all events" test to reach this result.*

The "all events" test has become so accepted that it is now embodied in the Income Tax Regulations.

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[7] Trial Judge Willi did not have the benefit of *Union Pacific* at the time he rendered his Kodak opinion. The Kodak recommended decision was submitted in April 1975, while *Union Pacific* was announced October 22, 1975.

> Under an accrual method of accounting, an expense is deductible for the taxable year in which all events have occurred which determine the fact of liability and the amount thereof can be determined with reasonable accuracy. Treas. Reg. § 1.461–1(a)(2) (1970). (Originally promulgated in 1957, 1958–1 Cum. Bull. 215 (1957)).

Normally we would proceed directly to apply the "all events" test to the facts of the instant situation in order to determine the proper deduction time for the tax expense at issue here. However, defendant argues that the recent Supreme Court decision in *Otte* v. *United States*, 419 U.S. 43 (1974) requires us to hold that payroll taxes are not deductible until the underlying compensation is *paid*. Therefore, we must first ascertain the impact of *Otte* on the "all events" test.

The *Otte* decision relied upon by defendant is a bankruptcy case. The specific portion of the case which defendant would have us use instead of the "all events" test concerned the filing of proofs of the bankruptcy claim. The general rule in the bankruptcy setting is that in order to obtain a share of the bankrupt's estate, proof of claim against the bankrupt must be filed within six months of the initial bankruptcy court order. In *Otte*, neither the United States nor New York City had filed proof of payroll tax liability on the part of the bankrupt. The bankruptcy trustee argued that the taxes could not be recovered from the estate because of this failure to file notice of the tax claim. The government instrumentalities contended otherwise. The Supreme Court held in favor of the governments. Reasoning that "[l]iability for the tax accrues only when the wage is paid," the Court excused both the United States and New York City from the filing requirement.

In the instant case, defendant argues that *Otte* either overrules the "all events" test in the payroll tax area, or it presents an "ultimate application" of the test. For several reasons we reject such arguments.

First on a fundamental level, the *Otte* decision rests on bankruptcy law, the "all events" test on tax accounting principles. *Otte* never addressed the timing of "accrual" in the tax setting. We simply cannot presume that a bankruptcy decision overrules, *sub silentio*, tax accounting principles

established by the Supreme Court some fifty years ago and consistently applied by courts, tax regulations and taxpayers in all intervening years.

Second, the rationale of *Otte* does not conflict with the "all events" test. To say, as defendant argues, that *Otte* alters the "all events" test, confuses two very different concepts. The *Otte* decision hinges upon the accrual of legal liability. The "all events" test measures the proper timing for expense deductions. The technical term "accrual" as used in *Otte* refers to the time that a liability comes into existence as a *legally enforceable claim*. The "all events" test on the other hand looks to a liability that is so fixed that the fact of liability is certain and the amount thereof reasonably ascertainable, although not necessarily legally enforceable. The "all events" test thus allows deductions when the taxpayer has a special kind of knowledge which gives him enough facts to demonstrate the absolute necessity of paying an expense at some future date without regard to such matters as actual payment taking place, existence of legal liability, or accrual. Therefore, we cannot construe the *Otte* language as affecting the "all events" test since *Otte* is based on a concept of "accrual" which has no relation to the problem of deduction timing.

Third, we should not drive a further wedge into existing differences between tax and business accounting methods without a compelling reason to do so. Tax accounting treatment of income and expense often differs from the generally accepted principles of business accounting. *Cf. American Automobile Association*, *supra*. However, there is usually some good explanation for the divergence. For example, the question of deduction of expense from income is an area where business accounting and tax accounting provide different treatment of expense items. In *Union Pacific*, *supra*, we determined that the taxpayer could not deduct payroll taxes on accrued vacation pay in an earlier year because the *fact of tax liability* could not be determined with certainty as of the end of the prior year. But, from a business standpoint, the tax expense was so readily calculable that the taxpayer rightfully would have been warranted to take the expense deduction on its income statement in the earlier year. Why this

difference between business and tax accounting? The primary reason here is *certainty*. For *business purposes*, the expense can be deducted if a *reasonable estimate* can be made. For *tax purposes*, the expense cannot be taken unless (1) the fact of liability is *certain* and (2) a reasonably ascertainable computation of the amount can be made.

If we follow *Otte* and conclude that no payroll tax deduction can be taken until the underlying wage is *paid*, we would create a further split between tax and business accounting *without* a reasonable explanation for requiring different treatment. Absent a compelling basis providing otherwise, our goal should be to reconcile business and tax treatment of an item, rather than to drive them farther apart.

Finally, defendant argues that application of *Otte* does not overrule or even alter the "all events" test, but merely presents its "ultimate application" in the payroll tax area. However, defendant ignores the fact that if the underlying wage payment is the necessary last hurdle needed for the test, there is no test remaining. Such an interpretation would sound the death knell of the long-followed "all events" test in the payroll tax area. The "payment" requirement effectively puts taxpayers on a cash basis for purposes of payroll tax deductions. We see no reason for construing *Otte* in this manner.

In short, we do not interpret *Otte* as overruling or changing the application of the "all events" test. As the Supreme Court declared some fifty years ago, the "all events" test is the valid indicator for timing expense deductions.[8]

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[8] In addition to its reliance on *Otte* for the proposition that plaintiff may not deduct the payroll taxes until the underlying compensation is paid, the dissent cites a number of statutes and regulations. These statutes and regulations are inapplicable to the *deduction timing problem* before the court in the instant case. For example, the FICA and FUTA statutes used by the dissent (§§ 3111, 3301) pertain to "Rate of tax," *not* to timing of deductions. The Treasury Regulations (§ 31.3111–3, 4) also do *not* govern deductions for the tax expense. Finally, the dissent relies upon section 162(a) to bolster its "payment requirement." While this section does apply to the instant problem, the dissent's interpretation of the term "incur" is so narrow as to emasculate accrual tax accounting. Such an interpretation of "incur" contravenes tax statutes (*see, e.g.* § 446(b), taxpayer's accounting method must clearly reflect income) and numerous Supreme Court decisions (*see, e.g. Anderson, supra.* "It has never been questioned that a taxpayer who accounts on the accrual basis may *and should*, deduct from gross income a liability which really accrues in the taxable year." *Dixie Pine Co.* v. *Comm'r*, 320 U.S. 516, 519 (1930) (emphasis added)).

Having determined that we must apply the "all events" test, we turn to the three types of compensation in the present action: (1) "year-end" wages, (2) bonuses, and (3) vacation pay.

We shall evaluate each of these types of compensation to find if the test is met for 1964. Before we begin this undertaking, an understanding both of the nature of the payroll taxes and of the "all events" test is called for.

The "all events" test presents two hurdles for taxpayers who desire expense deductions. First, the taxpayer must show that the *fact of liability* is certain as of the end of the year in question. Second, the taxpayer must demonstrate that the amount of the liability can be reasonably ascertained. The central consideration here is that the *fact of liability* is measured on an item by item basis, rather than as an overall estimate. More specifically, in the payroll tax area, the fact of liability is measured by considering *each individual employee* rather than the totality of all employees. *Union Pacific*, *supra*, 208 Ct. Cl. at 20, 524 F. 2d at 1350; *Clevite Corp.* v. *United States*, 181 Ct. Cl. 652, 658, 386 F. 2d 841, 843 (1967). Rev. Rul. 54–608, 1954–2 Cum. Bull. 8, 9–10. In the case at bar, Kodak must show that the fact of payroll tax expense for the given employee was *certain for each employee* as of the end of 1964 *and* that the amount of such liability was reasonably ascertainable with regard to each employee.[9]

The payroll taxes at issue in this case are all of the same nature. Each represents a tax levied as a percentage of compensation paid by an employer to his employees.[10] If the taxes held no more complications than this, application of the "all events" test to them would be easy. When the employer became liable for the wages, we could simply apply the tax rate and find precisely how much tax would arise in conjunction with the compensation. For example, if plaintiff owed $100,000 in accrued vacation pay to its employees at the end

[9] The determination of the fact of liability by evaluating each individual employee obviates plaintiff's "forecasting" argument. (Lumping all employees together and determining tax liability as an overall guestimate). The "all events" test never contemplated creation of a legal weather bureau for tax deductions. The unreliability and uncertainty inherent in "forecasting" tax expenses is obvious.

[10] The FICA tax rate for the years in question was three and five-eighths percent; the FUTA, 3.1%.

of 1964, plaintiff would, absent further complications, have been liable for $3100 in FUTA tax and for $3625 in FICA tax in 1965. All events fixing this liability would have occurred at the time the vacation pay accrued at the end of 1964, and plaintiff would have been entitled to a 1964 deduction for FICA and FUTA tax.

However, one added factor complicates application of the "all events" test. This is the yearly "ceiling" on the payroll taxes at issue here. Each of the taxes contains such a ceiling.[11] For example, the FICA ceiling on wages paid during the years at issue here was $4800. Until an employee earned this amount in a given year, the employer paid FICA tax on his wages. After the employee earned $4800 in a given year, no FICA tax was imposed on subsequent wages paid by the employer. The effect of the ceiling is to create a degree of uncertainty in determining, as of the end of a given year, at what time or for how many months an employer will have to pay tax during the next year for each individual employee.

Let us use another example. This time we refer to the *Union Pacific* case mentioned above. There, various employees earned vacation pay in 1942. The plaintiff became liable to pay this compensation as of the end of 1942 despite the fact that its employees were not to be paid until 1943. The payroll tax on these accrued wages was subject to an individual monthly ceiling of $300. If an employee earning $600 per month took his vacation during the first week of a given month in 1943, payroll tax would be imposed on the employer. If he took the vacation during the last week, no tax would be imposed. The employees could elect the time they would take their 1943 vacations, and there was no way that plaintiff could tell at the end of 1942 whether or not it would, in fact, have to pay tax on a given employee's vacation pay in 1943. Thus all events were not met because of the ceilings, and the taxpayer could not deduct the payroll taxes in its 1942 return. *Union Pacific*, *supra*.

Having discussed the nature of the "all events" test and the payroll taxes, we now apply the "all events" test to the tax expenses in question.

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[11] The following ceiling applied to the taxes at issue here: FICA, $4800 per year; FUTA, $3000 per year; New York unemployment, $3000 per year; Tennessee unemployment, $3300 per year.

The first compensation payment we consider is the "year-end" wages which were earned in 1964, but paid the first week of 1965. No one disputes the fact that plaintiff was totally and unequivocally obligated to pay the wages as of the end of 1964. Plaintiff has demonstrated that its legal obligation to pay the "year-end" wages was fixed, certain, and exactly ascertained upon the termination of that tax year. It properly deducted the "year-end" wage expense from its 1964 income. Concurrently, plaintiff's obligation for payroll tax on the "year-end" wages also became *fixed* and *certain* as an automatic consequence of the definite and legal obligation to pay the "year-end" wages. All that was required of plaintiff to determine its tax was a simple, precise, mathematical calculation. *Nothing* depended on the taxpayer's discretion or on outside events which might or might not occur.[12] The payroll taxes on "year-end" wages meet the "all events" test, and plaintiff is entitled to deduct them on its 1964 return.

The second type of accrued compensation, bonuses, presents a more complex problem. The bonuses accrued on December 31, 1964. They were payable in March 1965. Since plaintiff knew the yearly salary of each employee, it could, but for one event, determine as of the end of 1964, the fact of tax liability on the bonuses. The one event which clouds this picture stems from the possibility that the employee might receive a pay raise during the interval between December 31 and the time of the March bonus payment.

[12] The dissent contends that Kodak's obligation to pay the taxes on "year-end" wages was not fixed at the end of 1964, but was contingent. It cites many cases, presumably in support of such a proposition. We agree with the dissent that if a liability is contingent, the "all events" test fails of application. Indeed, in each case cited by the dissent, the obligation was so uncertain and contingent that the "all events" test could not be used. However, the essential difference between such cases and the present action is "glossed over" by the dissent. In the cited cases, expenses could not be deducted because the obligation was *not fixed*. In the instant case, the payroll taxes on "year-end" wages (using the dissent's own tests) were: (1) determined; (2) settled; (3) certain; (4) definite; (5) conclusively fixed; (6) authoritatively fixed; (7) within set bounds or limits, and (8) limited in extent or scope. Clearly plaintiff's payroll tax obligation on the "year-end" wages was *not contingent* and the dissent's cases are inapposite. Further, we cannot say (as does the dissent) that the remote possibility of plaintiff's bankruptcy injects an element of uncertainty sufficient to deny a deduction. After all, bankruptcy is always a "possibility," and therefore the "all events" test could never apply in any situation. Also, such reasoning would totally destroy accrual tax accounting and would clearly conflict with section 446(b), *supra*.

We turn to another example. An employee earning $2000 per month was to receive his dividend of $800 on March 1, 1965. On December 31, 1964, plaintiff could readily see the fact of liability in that it would be responsible for FICA tax on the bonus when it made the March payment. But, if the employee received a raise to $3000 per month in January, effective February 1, 1965, plaintiff would no longer be liable for the tax when the March payment was made, since the employee would have reached the $4800 ceiling in February.

Because of the uncertainty raised by possible early 1965 salary increases, we cannot say that plaintiff knew in December 1964 the fact of its 1965 tax liability on each individual employee for bonuses. Since the fact of tax liability must be certain, the "all events" test fails of application at this point. We find it unnecessary to reach the second hurdle, whether the amount itself was reasonably ascertainable. The "all events" test is not met for plaintiff's taxes on accrued bonuses and Kodak may not deduct the payroll taxes imposed on such bonuses in its 1964 return.

The final type of compensation at issue here, accrued vacation pay, presents a situation quite similar to the *Union Pacific* case. Although this case differs from *Union Pacific* in that the tax ceilings are yearly rather than monthly, the principle remains the same. Plaintiff cannot demonstrate that it knew in December 1964 when a given employee would take his 1965 vacation. Thus Kodak could not know in 1964 whether the employee would take the vacation before or after said individual employee's salary reached the 1965 ceiling. Plaintiff could not determine precisely as of the end of 1964, the fact of tax liability on vacation pay earned by each individual employee. Since the fact of tax liability must be certain, the "all events" test fails of application at this point. We again find it unnecessary to reach the second hurdle, whether the amount itself was reasonably ascertainable.

In summary, in this income tax refund suit, plaintiff attempts to obtain a 1964 deduction for payroll taxes imposed on compensation which plaintiff properly accrued and deducted in its 1964 tax return. The principles of "matching," of consistency in past accounting practice without chal-

lenge, and of allocation as in *J. I. Case Co.*, do not grant plaintiff the right to such 1964 deduction. The "all events" test is the proper method for determining the deductibility of payroll taxes in 1964. *Otte* does not operate to extinguish the "all events" test in the tax arena. The test must be applied to each employee on an individual basis. Plaintiff must show that the fact of tax liability is certain *and* that the amount of tax is reasonably ascertainable for each individual employee. For the tax on "year-end" wages, plaintiff has been able to demonstrate both, but has failed to show that the fact of tax liability was certain with respect to the tax on bonuses and vacation pay.

Accordingly, plaintiff is not entitled to a 1964 income tax deduction for payroll taxes pertaining to accrued bonuses and accrued vacation pay. Plaintiff is entitled to deduct from its 1964 income, payroll taxes imposed on "year-end" accrued wages.

BENNETT, *Judge*, concurring:

Otte v. *United States*, 419 U.S. 43 (1974), announces the principle that only at such time as the underlying employee compensation is paid does the legal liability for appurtenant employment taxes become presently enforceable. This is a good rule if properly confined to a case such as *Otte*. But, prior to the moment at which legal liability for employment taxes becomes presently enforceable, for tax purposes all events may occur which of logical necessity collectively determine whether or not the taxpayer will at some later time encounter a presently enforceable legal liability for such taxes. In the instant case employees' year-end wages were earned in 1964, subject to actual payment at a time in 1965 when liability for employment taxes would attach to such payment as a matter of law. Therefore, the fact of legal liability for employment taxes—enforceable at a future time—existed in 1964, as soon as year-end wages were earned. The earning of year-end wages constitutes the final event determinative of the fact of liability for appurtenant employment taxes in a reasonably ascertainable amount in this part of the case. Accordingly, employment taxes attributable to such

year-end wages may be deducted in the year the wages are earned in the case of an accrual basis taxpayer.

The dissent rightly observes that the taxpayer could properly report a deduction for the year-end wages themselves in the year earned, "even though the wages were not yet due or payable." Thus, the court appears to be unanimous in the view that prior to the time a legal liability becomes presently enforceable, all events may well come to pass determining the fact of liability in a reasonably ascertainable amount. If the contingency that the wages will not be paid when actually due does not preclude a deduction for such wages in the year earned, I see no logical reason why the same contingency should work differently and rule out a deduction for appurtenant employment taxes corresponding to the year-end wages accrued in the same year and which wages give rise to the taxes. All events have fixed both liability and the reasonably ascertainable amount of taxes. I do not consider that the Supreme Court has overruled this test which has been the law at least since 1926 in timing expense deductions. *Otte* did not even mention *Anderson*, let alone overrule it. Nor was it necessary to discuss *Anderson* since it was a problem in quite a different context. *Otte* is no authority presently relevant and the numerous authorities relied on in the dissent are not relevant when we consider that the premise used for them—payment of wages as the controlling event that would allow taxes to be accrued—is without foundation under the facts and law of this case.

With deference to the thorough analysis set down in Judge Skelton's opinion, I join the majority opinion.

SKELTON, *Judge*, dissenting:

I cannot agree with the majority opinion in this case for the many reasons set forth below:

I

The majority opinion is in direct conflict with the unanimous decision of the Supreme Court in *Otte* v. *United States*, 419 U.S. 43 (1974).

In the instant case the majority holds that the accrual taxpayer, Eastman Kodak Company (Kodak), had a fixed, de-

termined, and certain obligation and liability for taxes under the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and various state unemployment tax statutes, in 1964 on certain described wages of its employees for services rendered in that year and could accrue and deduct such taxes in 1964 as expenses paid or incurred in that year even though such wages were not paid until 1965.[1]

The Supreme Court held in positive and unequivocal language in the *Otte* case, speaking through Mr. Justice Blackmun, that no such tax liability exists until the wages are paid and that the accrual of such tax liability occurs only when the wages are paid. Quoting from the opinion in the *Otte* case we find that the Court held:

> * * * *Liability for the taxes accrues only when the wage is paid.* Sections 3402(a) and 3101(a) of the 1954 Code; * * *. The wages that are the subject of the wage claims, although earned before bankruptcy, were not paid prior to bankruptcy. *Freedomland* [*the employer*] *had incurred no liability for the taxes. Liability came into being only during bankruptcy.* [When the trustee paid the wages to the employees.] * * * [*Id.* at 55.] [Emphasis supplied.]

Speaking further, the Court said:

> * * * As has been noted above, *the taxes did not become due and owing at all until the claims, constituting wages, were paid.* * * * [*Id.* at 56.] [Emphasis supplied.]

With further reference to the accrual of the taxes, the Court stated:

> * * * *They* [*withholding taxes*] *accrue only as those claims* [*for wages*] *are paid* and, to the extent of that payment, the payment of the taxes should be assured. * * * [*Id.* at 57.] [Emphasis supplied.]

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[1] In this opinion the terms "wages," "dividend bonuses," and "vacation pay" will be considered and referred to as "wages" because of the provisions of Section 3306 of the Internal Revenue Code (26 U.S.C. § 3306 (1964)) as follows:

"§ 3306. Definitions.

* * * * *

(b) Wages.

For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *"

Both parties agreed that all of these items should be treated as "wages."

I agree with our Trial Judge George Willi that the *Otte* case is controlling and dispositive of the instant case against the taxpayer. The majority has apparently brushed the *Otte* decision aside because it was a bankruptcy case, but in doing so they have ignored the holding of the case that is controlling here, namely, that an employer, (such as Kodak), has no liability whatever for withhholding taxes on wages of its employees until the wages have been paid, and such taxes cannot be accrued until after the payment of such wages. Kodak was in the same position in 1964 with respect to such taxes as the employer in the *Otte* case. Neither employer had paid the wages to the employees, and, consequently, had no liability for the payment of the taxes, and for that reason could not accrue them until the underlying wages were paid. For all of these reasons, the majority opinion conflicts with the *Otte* decision. The majority has failed and refused to follow that decision of the Supreme Court, which is error.[2]

II

The majority opinion is contrary to the following controlling statutes.

1. Section 162 of the Internal Revenue Code of 1954 (26 U.S.C. § 162 (1964)) provides as follows:

> § 162. Trade or business expenses.
>
> (a) In general.
>
> There shall be allowed as a deduction all the ordinary and necessary expenses *paid or incurred during the taxable year* in carrying on any trade or business, * * * [Emphasis supplied.]

Certainly the taxes here were not *paid* during the taxable year of 1964 when the taxpayer accrued and deducted them. Neither were they *incurred* during that year. We need look no further than the *Otte* case to decide that there was no obligation or liability on Kodak for the taxes in 1964 because

[2] In refusing to follow the decision of the Supreme Court in the *Otte* case, the majority appears to be making the same error the then majority made in *Mason* v. *United States*, 198 Ct. Cl. 599, 461 F. 2d 1364 (1972), when they failed to follow the Supreme Court's decision in *West* v. *Oklahoma Tax Comm'n*, 334 U.S. 717 (1948). The Supreme Court reversed the decision in the *Mason* case in *United States* v. *Mason*, 412 U.S. 391 (1973) because the majority failed to follow its decision in the *West* case.

the underlying wages had not been paid. Therefore, the tax liability on such wages was not *incurred* during that taxable year and could neither be accrued nor deducted. The word "incur" is defined in Webster's Third new International Dictionary (1967 ed.) as follows:

> Become liable or subject to; to render liable or subject to.

Kodak was neither liable for nor subject to the payment of the taxes until it paid the wages. Therefore, it must be concluded that the majority opinion is in conflict with Section 162 of the Code.

2. The FICA provision of the Code (26 U.S.C. § 3111 (1964)) provides as follows:

> § 3111. Rate of Tax. [As amended by Sec. 201(c), Social Security Amendments of 1961, Pub. L. No. 87–64, 75 Stat. 131.]
>
> In addition to other taxes, *there is hereby imposed on every employer* an excise tax with respect to having individuals in his employ, equal to the following percentages of *the wages* (as defined in section 3121(a)) *paid by him* with respect to employment (as defined in section 3121(b))—
>
> * * * * *
>
> (2) *with respect to wages paid during the calendar years 1963 to 1965, both inclusive*, the rate shall be 3⅝ percent; [Emphasis supplied.]

The FUTA provisions of the Code (26 U.S.C. § 3301 (1964)) are very similar, as follows:

> § 3301. Rate of tax. [As amended by Sec. 523(a), Social Security Amendments of 1960, Pub. L. No. 86–778, 74 Stat. 924 and Sec. 2(a), Act of May 29, 1963, Pub. L. No. 88–31, 77 Stat. 51.]
>
> *There is hereby imposed on every employer* (as defined in section 3306(a)) for the calendar year 1961 and for each calendar year thereafter *an excise tax*, with respect to having individuals in his employ, equal to 3.1 percent *of the total wages* (as defined in section 3306(b)) *paid by him during the calendar year* with respect to employment (as defined in section 3306(c) after December 31, 1938. In the case of wages paid during the calendar year 1962, the rate of such tax shall be 3.5 percent in lieu of 3.1 percent. In the case of wages paid during the calendar year 1963, the rate of such tax shall be 3.35 percent in lieu of 3.1 percent. [Emphasis supplied.]

It is clear from these provisions of the Code that the taxes are imposed on employers, such as Kodak in our case, on wages *paid* by the employer *during the calendar year in question.* If he does not pay any wages during a calendar year, he is neither obligated to pay a tax nor liable for one, and, of course, could neither accrue a tax as an expense nor deduct it from his income tax. That is Kodak's situation here. It did not pay the wages in 1964 and consequently no tax was imposed upon it and it could not legally accrue or deduct any tax. The majority is in error in holding contrary to these statutes.

III

The majority opinion conflicts with the following Treasury Regulations on Employment Tax (26 C.F.R.)

The applicable Treasury Regulations provide as follows:

§ 31.3111–3 When employer tax attaches.

The employer *tax attaches at the time that the wages are paid by the employer.* * * * [Emphasis supplied.]

§ 31.3111–4 Liability for employer tax.

The employer is liable for the employer tax with respect to the wages *paid* to his employees for employment performed for him. [Emphasis supplied.]

These regulations could not be stated more clearly that the employer is liable for taxes on wages *paid* to his employees and that *such tax attaches at the time wages are paid and not before.* The majority apparently ignore these regulations and the foregoing statutes upon which they are based and allow Kodak to accrue and deduct taxes on wages due its employees in 1964 even though the wages were not paid in that year and even though it had no liability for such taxes in 1964 by the plain wording of the statutes and regulations. The majority have not held that the statutes and regulations are invalid, yet such a holding is required if the decision of the majority is a correct interpretation of the law. It is clear that even the majority is unwilling to go that far. Therefore, the statutes and regulations are valid and controlling, and the majority erred in their opinion which clearly conflicts with the statutes and regulations.

IV

The majority opinion fails to meet the requirements of the "all events" test of the Supreme Court and Treasury Regulations.

The mainstay of the majority opinion is that the requirements of the "all events" test have been met in this case, and their decision is based on that premise. It follows that if the "all events" requirements have *not* been complied with, the majority opinion is wrong. I propose to show in the following paragraphs that the majority opinion does not comply with the "all events" test.

The "all events" test was established by the Supreme Court in *United States* v. *Anderson*, 269 U.S. 422 (1926). In that case the Revenue Act of 1916 imposed a tax on manufacturers on their profits on munitions manufactured by them in 1916. This tax was paid in 1917. The Government contended that the taxpayer should have deducted the munitions tax in 1916 in computing its income tax. The accrual basis taxpayer contended that the tax was deductible in 1917 when it was paid. The Court held that the statutory liability to pay the tax was fixed as soon as the income was earned, and, since the income and profits were earned by the end of the 1916 taxable year, the liability for the tax became fixed in 1916 and was deductible in that year rather than in 1917, the year of payment. It is clear that in that case the tax was by statute fixed as a charge on the earnings of the company in 1916. Furthermore, everything had been done in 1916 to fix the liability of the company for the taxes and nothing remained to be done in 1917 to fix or determine such liability. It is evident that the facts in *Anderson* are distinguishable from those in the instant case, because here everything had not been done in 1964 to fix and determine the liability of Kodak to pay the taxes. The missing and controlling event was the failure to pay the wages in 1964. Without such payment, there was no fixed, certain, or determined liability on Kodak to pay the taxes. Consequently, the vital, controlling, and missing "event" was missing from the "all events" test, namely the payment of the wages in 1964, without which all events had not occurred to fix or determine

any tax liability on Kodak on such wages in 1964. In fact, without the payment of the wages in 1964, there was no liability whatever on Kodak in 1964 to pay taxes on such wages. *See Otte* v. *United States*, *supra*, and the above statutes and regulations.

The all events test set forth in the *Anderson* case states:

> * * * [*A*]*ll the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it.* * * * [*T*]*he munitions tax* here in question *did not stand on any different footing than other accrued expenses* appearing on appellee's books. * * * [269 U.S. at 441.] [Emphasis supplied.]

It will be noted that in *Anderson* the Court was dealing with an entirely different statute that *fixed* a munitions tax liability on munitions profits for 1916, which was an actual expense or element of cost in the production of income for that year, and a *definite liability* to pay the tax that had been imposed on the manufacturer by the end of 1916. Every fact or circumstance affecting the *fixing* or *determination* of the tax as a definite obligation of the taxpayer had occurred by the end of that year. By the close of 1916, liability for the tax had become definitely fixed, the tax being imposed *by statute* on the operations for 1916, which were terminated on December 31, 1916. Neither *liability for the tax* nor the amount payable could be affected under the law by anything occurring after December 31, 1916. The taxpayer in that case set up a monthly reserve of $35,000 on its books in 1916 to pay the munitions tax on its profits for that year, and on December 31, 1916, this reserve account was closed out and a charge was made on its books against the corporate surplus for account of the 1916 munitions taxes of $86,541.95. The Court concluded that the reserves for munitions taxes on taxpayer's books were deductible under the Act of 1916 for that year.

Thus, we see that *Anderson* involved an entirely different statute compared to those in the instant case. The munitions statute *fixed* a definite liability on the taxpayer in 1916 for taxes on its profits in that year. There is no statute in our case fixing liability on Kodak in 1964 for withholding taxes on unpaid 1964 wages. Furthermore, Kodak did not set up a reserve for such taxes in 1964.

Dissenting Opinion by Judge Skelton

It is clear that the *Anderson* case and our case are both controlled by different applicable governing statutes and regulations. In *Anderson*, the statute imposed and fixed the tax liability of the taxpayer in 1916 on the profits for that year. In our case, the FICA and FUTA statutes impose taxes on wages whenever paid, whether in 1964 or later, but there is no tax liability until the wages are paid.

The all events test was designed to allow the accrual of expenses that were fixed, determined, and certain, as for instance, the wages in our case. The services had been performed by the employees in 1964 and the liability of Kodak to pay them their wages was fixed, determined, and certain. Nothing further remained to be done to fix or make certain taxpayer's liability in this regard, even though the wages were not yet due or payable, and, accordingly, the wages were properly accruable in 1964. The liability for the taxes on wages is an entirely different matter, because nothing occurred in 1964 to fix, determine, or establish liability of Kodak for taxes on wages, because the controlling event that would allow the taxes to be accrued had not yet occurred, namely the payment of the wages. See *Otte* and the above statutes and regulations.

The so-called all events test is set forth in Treasury Regulation 1.461–1 in pertinent part as follows:

> § 1.461–1 General rule for taxable year of deduction
>
> * * * * *
>
> (2) Taxpayer using an accrual method. * * * [A]n expense is deductible for the taxable year in which *all events have occurred which determine the fact of the liability* and the amount thereof can be determined with reasonable accuracy. * * * [*N*]*o accrual shall be made in any case in which all of the events have not occurred which fix the liability*, * * *. [Emphasis supplied.]

It will be noted that both the *Anderson* case and the foregoing regulation require a liability to be "fixed" and "determined" by the occurrence of all the events necessary to establish the fact of liability before it can be accrued and deducted in a taxable year. It is clear that the facts in the instant case do not meet the requirements of this test.

The word "fix" is defined in BLACK'S LAW DICTIONARY 765 (4th ed. 1968) as follows:

> Determine; settle; certainty and definiteness. To fasten a liability upon one. To transform a possible or contingent liability into a present and definite liability.

The word "determine" is defined in Webster's Third New International Dictionary (1967 ed.) as follows:

> To fix conclusively or authoritatively; to set bounds or limits to; to limit in extent or scope.

It must be conceded that there was no fact in this case that fixed, determined, or made certain a present and definite liability of Kodak in 1964 for the taxes on the unpaid wages of its employees. Consequently, the accrual and deduction of such taxes by it in 1964 when it had no liability in that year with respect to such taxes, was contrary to the decision of the Supreme Court in *Anderson* and in conflict with Treasury Regulation 1.461–1(2) cited above.

The majority have allowed Kodak to accrue and deduct in 1964 a *contingent* tax liability on the unpaid wages of its employees. To put it another way, its liability for taxes on wages was not fixed, determined, nor certain as an obligation in 1964 but was *contingent* on its payment of the wages. The Supreme Court and other courts have held many times that an accrual taxpayer may not accrue and deduct a contingent liability under the all events test. Considering the Supreme Court decisions on this question in chronological order, we find the following:

In *Lucas* v. *American Code Co.*, 280 U.S. 445 (1930) an accrual taxpayer sought to deduct as a loss in 1919 the amount of a judgment for breach of contract it suffered in 1922 and paid in 1923. The Court disallowed the deduction in 1919 even though the breach of contract occurred then because its liability was contingent. The Court said:

> The prudent business man often sets up reserves to cover *contingent liabilities. But they are not allowable as deductions.* The reserve set up by the Company was of that character. It cannot be said that the loss actually paid by the Company in 1923 was, as a matter of law or of undeniable fact, sustained in 1919. Nor did the Company so regard it. *The case at bar is unlike United States* v. *Anderson*, 269 U.S. 422. There, the liability for

> the munitions tax at a fixed rate on the business done in 1916 had confessedly accrued in that year and was a charge on the business of that year, although the exact amount due may not have been then ascertainable and the tax was not payable until 1917. It is also unlike *American National Co.* v. *United States*, 274 U.S. 99. There, the bonus contract provided definitely for the payment of a fixed amount. It was *debitum in praesenti, solvendum in futuro*. The case at bar is in principle more like *Lewellyn* v. *Electric Reduction Co.*, 275 U.S. 243. [Footnote omitted.] [Emphasis supplied.] [*Id.* at 452.]

It should be noted that as shown above, the Court distinguished the *Anderson* case by saying that the tax in that case had confessedly accrued in 1916 and was a charge on the business of that year.

In *Brown* v. *Helvering*, 291 U.S. 193 (1934), an insurance agent attempted to deduct an amount from his income tax representing estimated future cancellations of policies based on past year's experience. The Supreme Court disallowed the deduction on the ground that the liability was a contingent one and could not be accrued and deducted as expenses of the current year. The Court held:

> These charges on account of credits to the "Return Commission" reserve account are claimed as deductions on the ground that they are expenses "incurred," "during the taxable year." It is true that where a liability has "accrued during the taxable year" it may be treated as an expense incurred; and hence as the basis for a deduction, although payment is not presently due, *United States* v. *Anderson*, 269 U.S. 422, 440, 441; *American National Co.* v. *United States*, 274 U.S. 99; *Aluminum Castings Co.* v. *Routzahn*, 282 U.S. 92; and although the amount of the liability has not been definitely ascertained. *United States* v. *Anderson*, *supra*. Compare *Continental Tie & Lumber Co.* v. *United States*, 286 U.S. 290, 296. But no liability accrues during the taxable year on account of cancellations which it is expected may occur in future years, since the events necessary to create the liability do not occur during the taxable year. *Except as otherwise specifically provided by statute, a liability does not accrue as long as it remains contingent. Weiss* v. *Wiener*, 279 U.S. 333, 335; *Lucas* v. *American Code Co.*, 280 U.S. 445, 450, 452; compare *New York Life Ins. Co.* v. *Edwards*, 271 U.S. 109, 116; *Ewing Thomas Co.* v. *McCaughn*, 43 F. (2d) 503; *Highland Milk Condensing Co.* v. *Phillips*, 34 F. (2d) 777.

> *The liability* of Edward Brown & Sons arising from expected future concellations [sic] *was not deductible* from gross income *because it was not fixed and absolute.* * * * [Emphasis supplied.] [*Id.* at 200–01.] [Footnote omitted.]

Again in *Dixie Pine Co.* v. *Commissioner*, 320 U.S. 516 (1944), the Supreme Court denied an accrual taxpayer the right to deduct taxes in a current year because the liability for the taxes was *contingent.* The Court held:

> * * * It has never been questioned that a taxpayer who accounts on the accrual basis may, and should, deduct from gross income a liability *which really accrues* in the taxable year. It has long been held that in order truly to reflect the income of a given year, all the events must occur in that year *which fix the amount and the fact of the taxpayer's liability* for items of indebtedness *deducted though not paid*, and *this cannot be the case where the liability is contingent* and is contested by the taxpayer. * * * [Footnotes omitted.] [Emphasis supplied.] [*Id.* at 519.]

The Supreme Court again declared in *Security Flour Mills Co.* v. *Commissioner*, 321 U.S. 281 (1944) that a contingent liability for taxes could not be accrued and deducted in a current taxable year. There the Court said:

> It is settled by many decisions that a taxpayer may not accrue an expense the amount of which is unsettled *or the liability for which is contingent, and this principle is fully applicable to a tax*, liability for which the taxpayer denies, and payment whereof he is contesting. * * * [Footnote omitted.] [Emphasis supplied.] [*Id.* at 284.]

In that case, the Court compared the deduction of a contingent liability for taxes to an accrual taxpayer who has a lease for a period of years with the rental payable in installments over a series of years. In this regard, the Court said:

> * * * For example, a tenant would not be compelled to accrue, in the first year of a lease, the rental liability covering the entire term nor would he be permitted, if he saw fit to pay all the rent in advance, to deduct the whole payment as an expense of the current year. * * * [*Id.* at 285.]

It is obvious that such accrual could not be allowed because the rental liability for the succeeding years is not an obligation that is fixed and owing by the taxpayer until "the event" (rental due date) fixing liability for the rent on the taxpayer has occurred. Kodak is in exactly the same situation in the case before us. Until the event (payment of wages) occurs, Kodak has no liability or obligation to pay the taxes and cannot accrue them in advance. The taxpayer here argues that it will have to pay the taxes or else breach its contract with its employees to pay their wages. This is unpersuasive. Employers breach their contracts to pay employees' wages every day. That is what happened to the employer in *Otte*. He never paid the wages and for that reason never became liable for the taxes. While it is unlikely that a company as large and as responsible as Kodak would fail to pay wages due its employees, it is possible that this might happen due to circumstances beyond its control. If this happened, Kodak would never owe the taxes involved here. Therefore, it is inescapable that its liability for the taxes is contingent on its paying the wages, and this is the kind of contingent liability that the Supreme Court has held repeatedly cannot be accrued and deducted in the current year.

In the *Security Mills* case, the Supreme Court stated further:

> The rationale of the system is this: "It is the essence of any system of taxation that it should produce revenue ascertainable, and payable to the government, at regular intervals. Only by such a system is it practicable to produce a regular flow of income and apply methods of accounting, assessment, and collection capable of practical operation."
>
> This legal principle has often been stated and applied. The uniform result has been denial both to Government and to taxpayer of the privilege of allocating income or outgo to a year other than the year of actual receipt or payment, or, applying the accrual basis, the year in which the right to receive, *or the obligation to pay, has become final and definite in amount.* [Footnotes omitted.] [Emphasis supplied.] [*Id.* at 286–87.]

The holdings of the Court in the *Dixie Pine* and *Security Mills* cases were quoted with approval by the Supreme Court

in *United States* v. *Consolidated Edison Co.*, 366 U.S. 380 (1961). (See footnotes 6 and 7 at 385–86.)

One of the most comprehensive and case-supported statements to be found that contingent liabilities cannot be accrued and deducted by an accrual taxpayer is set forth in an opinion by the Third Circuit Court of Appeals in the case of *ABKCO Industries, Inc.* v. *Commissioner*, 482 F. 2d 150 (3d Cir. 1973). The case involved an attempt by a taxpayer to accrue and deduct royalties he claimed a contract required him to pay a performing artist, even though the royalties were not paid. The court held against the taxpayer saying the liability was contingent and could not be accrued for deduction purposes. The statement and decision of the court, in pertinent part, is as follows:

> Sections 446(a) and (c) of the Internal Revenue Code of 1954 authorize an accrual basis taxpayer to deduct an obligation in the taxable year in which *all the events have occurred which are necessary to establish the fact of liability and the amount thereof* with reasonable accuracy. See Treas. Reg. § 1.446–1(c)(1)(ii). The Commissioner and the Tax Court rely upon the settled principle that a taxpayer using the accrual method of accounting may not deduct any liability *until the contingencies relating to such liability are removed. Security Mills Co.* v. *Commissioner*, 321 U.S. 281, 284, 64 S. Ct. 596, 88 L. Ed. 725 (1944); *Dixie Pine Co.* v. *Commissioner*, 320 U.S. 516, 518–519, 64 S. Ct. 364, 88 L. Ed. 270 (1944); *Lucas* v. *American Code Co.*, 280 U.S. 445, 449–451, 50 S. Ct. 202, 74 L. Ed. 538 (1930); *American National Co.* v. *United States*, 274 U.S. 99, 104–105, 47 S. Ct. 520, 71 L. Ed. 946 (1927); *United States* v. *Anderson*, 269 U.S. 422, 440–441, 46 S. Ct. 131, 70 L. Ed. 347 (1926); *Lustman* v. *Commissioner*, 322 F. 2d 253, 258 (3d Cir. 1963); *Noxon Chemical Products Co.* v. *Commissioner*, 78 F. 2d 871 (3d Cir. 1935). *These cases hold that if all the events necessary to establish the fact of liability have not occurred, the liability is "contingent" and may not be accrued for purposes of deduction.* * * * [Emphasis supplied.] [*Id.* at 151.]

Judge Hastie, in his concurring opinion in that case, stated:

> * * * [T]he items deducted by the taxpayer as fixed accrued liabilities of the taxable years were only *contingent obligations* of undeterminable amount until some subsequent time. [Emphasis supplied.] [*Id.* at 156.]

The court also held that the determination of whether the events necessary to establish the fact of liability (the all events test) is a question of law rather than a question of fact. This appears to be correct.

There can be no doubt that a review of the above decisions show beyond any question that a contingent liability such as Kodak had in 1964 for the taxes in the instant case could not be accrued nor deducted in that year when the wages had not been paid and no liability whatever existed for the taxes until and unless the wages were paid. The majority errs in holding to the contrary, because the cited authorities show conclusively that the all events test had not been met as to this contingent tax liability.

In addition to the foregoing cases holding that contingent liabilities cannot be accrued or deducted by an accrual taxpayer in a current year, there are other cases that hold that where the taxpayer has no obligation or liability to pay an expense in a current year, such as Kodak here, he cannot accrue or deduct the expense in a current year because the all events test has not been met. Some of these cases will be discussed below.

In *Lucas* v. *Ox Fibre Brush Co.*, 281 U.S. 115 (1930), the board of directors of an accrual basis company voted in 1920 to pay each of its officers $24,000 as extra pay for "past services." The money was paid in 1920 and accrued and deducted the same year. The Government contended it should have been accrued and deducted in prior years since it was for services rendered in prior years. The Supreme Court held for the taxpayer on the ground that the payments were actually incurred and made in 1920 and "there was no prior agreement *or legal obligation* to pay the additional compensation." [3] [*Id.* at 119, emphasis supplied.] The Court held:

> This section [Section 212(b) of the Revenue Act of 1918] relates to the method of accounting; the Commissioner may make the computation on a basis that does clearly reflect the income, if the method employed by the taxpayer does not. But this section does not justify the Commissioner in allocating to previous years a reasonable allowance as compensation for services actually

[3] *See Seabright Woven Felt Co.* v. *Ham*, 38 F. 2d 114 (D. Maine 1930), for a similar case.

rendered, *when the compensation was properly paid during the taxable year and the obligation to pay was incurred during that year and not previously.* In the present instance, the expense could not be attributed to earlier years, for *it was neither paid nor incurred in those years. There was no earlier accrual of liability.* It was deductible in the year 1920 or not at all. Being deductible as a reasonable payment, there was no authority vested in the Commissioner to disregard the actual transaction and to readjust the income on another basis which did not respond to the facts. [*Id.* at 120.] [Emphasis supplied.]

In that case, the Supreme Court refused to follow the *Anderson* case relied on by Kodak in the instant case, saying:

> The case of *United States* v. *Anderson*, 269 U.S. 422, is not in point, as *there the liability for the munitions tax at a fixed rate had accrued in the earlier year (1916) and was a charge on the business of that year*, although the precise amount was ascertained and was payable in 1917. In *American National Company* v. *United States*, 274 U.S. 99, *there was a contract providing definitely for the payment.* Compare *Lucas, as Commissioner of Internal Revenue* v. *American Code Company*, 280 U.S. 445. [*Id.* at 120–21.] [Emphasis supplied.]

It should be clear from the above statement of the Supreme Court, as well as by statements of the Court in other cases and by other courts where the *Anderson* case is cited, that in *Anderson*, where the all events test was first announced, there was a definite, fixed, and positive liability and obligation for the munitions tax on the company in 1916 that was a charge on its business for that year. By contrast, in the case before us, there was no liability or obligation whatever on Kodak in 1964 for the withholding taxes on the unpaid wages of its employees. It is clear that the *Anderson* case is of no help to Kodak. It could be stated, as the Supreme Court did in the above case, that *Anderson* is not in point in our case.

The case of *Bauer Bros. Co.* v. *Commissioner*, 46 F. 2d 874 (6th Cir. 1931), *cert. denied*, 283 U.S. 850, was another case where a taxpayer gave bonuses to its employees in 1919 for services rendered in 1918 and accrued the amounts in 1918. There was no prior legal obligation to pay the bonuses for the 1918 services. The court held that since there was no legal obligation in the taxable year of 1918 for the taxpayer

to pay the bonuses, it could not accrue them in that year, but had to accrue them in 1919 when authorized and paid. The court said:

> * * * [T]he only question presented is whether they were incurred in 1918 within the meaning of the statute. Our first concern is with the sense in which the term "incurred" is used in section 234. It seems not to be disputed here that *expenses are incurred only when there is an agreement or a legal obligation to pay them within the taxable year.* Indeed, that seems to be the view taken of the very language of this section by the Supreme Court of the United States in *Lucas, Commissioner of Internal Revenue* v. *Ox Fibre Brush Co.*, 281 U.S. 115, 50 S. Ct. 273, 74 L. Ed. 773.
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> * * * * *
>
> It will therefore be observed that, whether the term "incurred" as used in the Revenue Act of 1918 is used in a technical legal sense or in an economic or bookkeeping sense, *the expenses are not incurred unless there has arisen a legal obligation to pay them, and they do not accrue within a given taxable year unless all of the events which fix the amount and determine the liability of the taxpayer to pay occur within that year.* * * * [*Id.* at 875–76.] [Emphasis supplied.]

The holding in *Bauer Bros.* set forth above was quoted with approval by the Eighth Circuit Court of Appeals in *Stern-Slegman-Prins Co.* v. *Commissioner*, 79 F. 2d 289 (8th Cir. 1935). In that case corporate officers had made donations from their salaries to the paid-in surplus of the corporation. The donations were accrued as a liability of the corporation during the taxable year the donations were made. The court held that this could not be done as the corporation had no liability or obligation to repay the donations to its officers and the expense was accordingly not incurred. The court said:

> * * * After these proceedings, all occurring within the taxable years involved, *there was no liability or obligation on the part of the corporation to pay the questioned amounts to its officers, and it did not in fact pay them. The expense was therefore not incurred. Bauer Bros. Co.* v. *Commissioner of Internal Revenue* (C.C.A. 6) 46 F. (2d) 874, 875; *Skinner Mfg. Co.* v. *United States* (Ct. Cl.) 8 F. Supp. 741, 745; *Desco Corporation* v.

United States (D.C.) 55 F. (2d) 411. [*Id.* at 291.] [Emphasis supplied.]

The same result should be reached in the instant case because Kodak had no liability or obligation in 1964 to pay the taxes and in fact did not pay them, and, therefore, the tax expense was not incurred and could not be accrued nor deducted in that year.

In *C. A. Durr Packing Co.* v. *Shaughnessy*, 81 F. Supp. 33 (N.D. N.Y. 1948) the court explained the meaning of the *Anderson* case as follows:

> The case of *United States* v. *Anderson*, 269 U.S. 422, 46 S. Ct. 131, 70 L. Ed. 347 is repeatedly urged as an authority holding that when all of the events have occurred which fixed the amount of the tax and determined the liability of the taxpayer to pay, then it may be said that the liability therefor has accrued. *This rather broad rule seems to have been limited in its application to such claims or liabilities which are reasonably certain in fact*, and ascertainable in amount. *Lucas* v. *American Code Co.*, 280 U.S. 445, 50 S. Ct. 202, 74 L. Ed. 538, 67 A.L.R. 1010. "It is settled by many decisions that *a taxpayer may not accrue an expense the amount of which is unsettled or the liability for which is contingent* * * *." *Security Flour Mills Co.* v. *Commissioner*, 321 U.S. 281, at page 284, 64 S. Ct. 596, at page 597, 88 L. Ed. 725. "*The requirement of valuation comprehends the element of collectibility.*" *Helvering* v. *Enright's Estate*, 312 N.S. 636, 61 S. Ct. 777, 782, 85 L. Ed. 1093.
>
> From the above authorities it appears that a claim may be accrued by a taxpayer for tax purposes when, (a), all of the events have occurred, *which fix the amount of the claim and determine the question of* liability; (b), the amount is readily ascertainable; (c), *the liability therefor is determined rather than contingent.* [*Id.* at 35.] [Emphasis supplied.]

The holding of the court as set forth above was quoted with approval in *Driscoll Bros. & Co.* v. *United States*, 221 F. Supp. 603 (N.D. N.Y. 1963).

The decision of the court in *Spencer, White & Prentis, Inc.* v. *Commissioner*, 144 F. 2d 45 (2d Cir. 1944), *cert. denied*, 323 U.S. 780, is dispositive of the instant case against the contentions of Kodak and literally destroys its position. In that case the accrual taxpayer was a contractor who ac-

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crued in a current year estimated expenses for work to finish a contract yet to be performed in a future taxable year. The deduction was disallowed. The court said:

> * * * But the fact that payments would have to be made by the taxpayer in a future year for work which had not been done in the year in question did not give rise to a proper tax deduction. *It is argued that it did give rise to such a deduction because a liability existed to perform the work during that year.* This theory, however, proves too much, for under it a taxpayer on the accrual basis could estimate the entire gross income which might be received from his contract, though no work had been begun, could deduct the estimated expense of performance and could compute the taxes accordingly. * * *
>
> The difficulty with the taxpayer's claim is that it ignores the fact that our income tax law is based upon annual periods of computation and that it seeks to have the taxes computed under a system which Justice Roberts, in *Security Flour Mills Co.* v. *Commissioner*, 321 U.S. 281, 287, 64 S. Ct. 596, 599, termed "partly annual and partly transactional." In *Dixie Pine Products Co.* v. *Commissioner*, 320 U.S. 516, 519, 64 S. Ct. 364, 365, the same Justice said: "It has never been questioned that *a taxpayer* who accounts *on an accrual basis may*, and should, *deduct from gross income a liability which really accrues in the taxable year.* It has long been held that, in order truly to reflect the income of a given year, *all the events must occur in that year which fix the amount and the fact of the taxpayer's liability for items of indebtedness deducted though not paid; * * *.*" *The liability for the estimated deduction clearly had not accrued during the year in which deduction was sought. The only thing which had accrued was the obligation to do the work which might result in the estimated indebtedness after the work was performed.*
>
> *It is well settled that deductions may only be taken for the year in which the taxpayer's liability to pay becomes definite and certain, even though the transactions (such as the contract in the present case) which occasioned the liability, may have taken place in an earlier year. Brown* v. *Helvering*, 291 U.S. 193, 54 S. Ct. 356, 78 L. Ed. 725; *American Hotels Corp.* v. *Commissioner*, 2 Cir., 134 F. 2d 817; *Amalgamated Housing Corp.* v. *Commissioner*, 37 B.T.A. 817, affirmed 2 Cir., 108 F. 2d 1010; cf. *Security Flour Mills Co.* v. *Commissioner*, 321 U.S. 281, 287, 64 S. Ct. 596; *Burnet* v. *Sanford & Brooks Co.*, 282 U.S. 359, 51 S. Ct. 150, 75 L. Ed. 383. Here the work for which the deduction is sought was

unperformed and its cost was, as we have already indicated, no more than a fair estimate. *Such a deduction as the taxpayer seeks had not accrued "during the taxable year"* and, therefore, did not meet the requirements of Section 23(a) of the Revenue Act of 1936, 26 U.S.C.A. Int. Rev. Code, § 23(a).

The petitioner's reliance upon United States v. *Anderson, 269 U.S. 422, 46 S. Ct. 131, 70 L. Ed. 347, is misplaced.* There the deduction of certain estimated tax liabilities set up in a reserve entered on the taxpayer's books in accordance with a Treasury Regulation was allowed, though the taxes had not been assessed. But *all the events had occurred which determined the liability to pay the tax. Here liability for the work done after July 1 1938, had not been incurred for the work had not been performed.* Cf. *Lucas* v. *American Code Co.*, 280 U.S. 445, 50 S. Ct. 202, 74 L. Ed. 538, 67 A.L.R. 1010. [*Id.* at 46–47.] [Emphasis supplied.]

Although the facts are different in that case to those in the case before us, the fundamental principles of law are the same in the two cases. It will be noted that in *Spencer* the contractor claimed the right to make the deduction of future expenses because he was obligated by contract in the current year to finish the work in a future taxable year when he would have to pay the expenses. That is the same argument made by Kodak in our case, namely, that it was obligated in 1964 to pay the wages to the employees in 1965 and by reason of that fact it would have to pay the taxes in 1965. The court in *Spencer* held that such an argument was not valid because "*the only thing which had accrued was the obligation to do the work* which might result in the estimated indebtedness after the work was performed." (Emphasis supplied.) In like manner, *in our case, the only thing that had accrued was the obligation to pay the wages*, which when paid in 1965 would create an obligation on Kodak to pay the taxes at that time. Neither the future contract expenses in *Spencer* nor the taxes in our case could be accrued until the liability for such expenses had been incurred in the taxable year when the deduction was made. The court in the *Spencer* case held in clear and unequivocal language that all events must occur in the year of deduction that fix the amount and *fact of liability* for the expenses deducted, and that a deduction may only be taken in the year in

which the taxpayer's liability to pay becomes *definite and certain* even though the transaction which occasioned the liability (such as the agreement to pay wages in our case) may have taken place in an earlier year. Kodak simply cannot meet these requirements in the instant case. It is significant, too, that the court in *Spencer* held that the taxpayer's reliance on *Anderson* was misplaced because there all the events had occurred which determined (fixed, established, made certain and definite) the liability to pay the tax, but in *Spencer* the liability for the (future) work had not been incurred "for the work had not been performed." In our case, the liability to pay the tax had not been incurred in 1964 because the wages had not been paid in that taxable year, just as the work had not been done in *Spencer* during the year of the deduction.

> The majority surprisingly agrees in footnote 12 that if a liability is "contingent" the "all events" test fails of application. This is an admission that the taxpayer *cannot accrue a debt that it does not owe.* That is exactly the situation of the taxpayer in the instant case. This admission forecloses the case against the plaintiff and emphasizes that the majority opinion is clearly erroneous when it allows the plaintiff to accrue and deduct taxes it does not owe. The majority intimates that if the taxpayer knows "how much" his taxes will be if and when he owes them, he can accrue and deduct them even though he is not obligated or liable to pay them. This is nothing more nor less than allowing the taxpayer to accrue and deduct a contingent liability, which even the majority agrees cannot be done.

While the majority holds that Kodak may not accrue and deduct in 1964 the dividend-bonus payment and the vacation pay withholding taxes because the amount due is uncertain and the all events test is not complied with, is a correct result, the reasoning and theory of such decision is incorrect and contrary to law. The dividends and vacation pay were vested in the employees at the end of 1964, which is a circumstance that did not exist in *Union Pacific R.R.* v. *United States*, 208 Ct. Cl. 1, 524 F. 2d 1343 (1975), relied on by the majority. The employees were entitled to the dividends and vacation pay on December 31, 1964, based on the wages

they earned in 1964.[4] What happened to their wages in 1965 is immaterial, as we are only concerned with wages earned in 1964. Yet the majority says that the dividends and vacation pay taxes cannot be accurately determined on December 31, 1964, because the employees might get a raise in salary in 1965. It is difficult to understand how a raise in wages in 1965 could affect the taxes on wages for 1964. The statutes fixing limits on wages with reference to FICA and FUTA taxes are Sections 3121 and 3306 of the Code. Section 3121 places a ceiling on wages of $4,800, with respect to employment *paid* to an individual by an employer *during a calendar year*, above which amount FICA taxes would not be paid on the salary. Section 3306 places the same limitation with respect to FUTA taxes, except the ceiling is $3,000 *paid during any calendar year*. The calendar year involved in this case is 1964 and the FICA and FUTA taxes must be calculated on the basis of wages, etc., paid or incurred during that year. What happened in 1965 with respect to the wages was immaterial. Besides any possible increase in wages in 1965, as suggested by the majority is wholly speculative and without any facts to support the theory.

Furthermore, the decision of the majority in this regard is in error for the additional reason that it indicates that the taxes for the dividends and vacation pay could be accrued and deducted in 1964 were it not for the possibility that the wages might be increased in 1965. This is contrary to all of the statutes, regulations, and decided cases cited above, because Kodak had no liability or obligation to pay the taxes on the dividend or vacation pay in 1964, and, therefore, could not accrue nor deduct such taxes in that year. Also, the possibility of an increase in salary in 1965 was not raised by the parties, was not briefed nor argued, and is a wholly speculative theory advanced by the majority. In any event, an increase in salary in 1965 could have no effect on the contingent liability of Kodak for withholding taxes on wages for 1964 as and when the wages for 1964 were paid by Kodak.

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[4] Vacation pay and bonuses are wages. See Sec. 3306(b) in footnote 1 and *United States* v. *Munro-Van Helms Co.*, 243 F. 2d 10, 13 (5th Cir. 1957) and 6 Remington on Bankruptcy, 382, Sec. 2807.

V

Conclusion

For all of the reasons stated above, I would enter judgment for the defendant and deny the plaintiff the right to accrue and deduct the involved taxes in 1964 on the unpaid wages, dividends and vacation pay earned by its employees as of the end of that year. I agree that the case should be remanded to the trial judge for further proceedings to determine the extent to which, if any, the deficiency assessment effected what amounts to a double disallowance of the same payroll tax items for purposes of computing the taxpayer's 1964 taxable income, which issue was severed by the trial judge pending the decision of the case by the court.

FINDINGS OF FACT

1. Plaintiff, Eastman Kodak Company, is a New Jersey corporation with its principal place of business at 343 State Street, Rochester, New York 14650. Its business is the manufacture and sale of photographic equipment and supplies and various chemical products.

2. On its books and its income tax returns plaintiff uses the accrual method of accounting, and since 1954 it has used a fiscal year of 52–53 weeks ending, in any event, on the last Sunday in December of each year. Prior to 1954 it filed its income tax returns on the basis of the calendar year.

3. At the end of 1964, plaintiff had 45,340 employees, located in forty states and the District of Columbia. Over 90 percent of those employees were in New York and Tennessee; over 98 percent were in New York, Tennessee, California, Illinois, New Jersey and Texas.

4. Plaintiff filed a federal income tax return for its taxable year ended December 27, 1964, with the District Director of Internal Revenue at Buffalo, New York, reporting a tax liability of $153,962,660 which it duly paid in installments in 1964 and 1965.

5. By timely consents in writing executed by plaintiff and the District Director, the time for additional income tax assessments for 1964 was extended to June 30, 1970, and the

time for filing claims for refund of income tax for 1964 was extended to December 31, 1970.

6. On audit of plaintiff's 1964 return, the Internal Revenue Service determined that it had improperly deducted liability for payroll taxes—*i.e.*, under the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and state unemployment tax statutes—on certain employee compensation ("year-end" wages, bonuses, and vacation pay) that plaintiff had not paid at the end of the taxable year. The audit report concluded that such payroll tax deductions did not meet the "all events" test of Treas. Reg. § 1.461–1(a)(2) because the liability for these payroll taxes did not "attach" until the compensation was paid. On the basis thereof, the Service proposed an increase in plaintiff's taxable income for 1964 in the amount of $1,914,273, calculated as total payroll taxes that plaintiff had deducted on unpaid compensation in 1964 in the amount of $2,835,802, reduced pursuant to Section 481 of the Internal Revenue Code by total payroll taxes that plaintiff had deducted on unpaid compensation in 1953 in the amount of $921,529.

7. On May 4, 1970, plaintiff paid additional income taxes for 1964 of $970,537, and interest thereon of $281,455.73. The additional taxes paid included $957,347 attributable to the income adjustment for the disallowance of the payroll tax deduction as reflected in the audit report.

8. On October 13, 1970, plaintiff filed a claim for refund of the federal income tax payment for 1964 attributable to the described adjustment, and for the interest on such payment. No part of this claim has been allowed or paid.

9. On its books and income tax return for 1964 plaintiff followed its prior practice, as hereafter described, of accruing liabilities for three types of employee compensation which had been earned prior to the end of the year but which was not paid until the following year—"year-end" wages, bonuses and vacation pay. The relevant circumstances were as follows:

(a) "*Year-end*" *wages.*—Plaintiff's employees carried on its weekly payroll are regularly paid each Thursday the wages earned by them in the preceding week. On its books and income tax returns, plaintiff, at the end of each taxable year, has accrued the wages earned during

the last week of that taxable year which were to be paid in the following taxable year. No issue is herein raised as to the propriety of the accrual of these "year-end" wages.

(b) *Bonuses.*—

(i) Under plaintiff's bonus plans applicable to all bonuses paid *during 1945 and in all years prior* thereto, each year (with the exception of 1934), it declared cash bonuses which were regularly paid to its eligible employees in March of the following year. Under those plans, an employee's entitlement to a declared bonus was generally dependent upon events subsequent to the end of the year in which the bonus was declared. With respect to all bonuses under those plans, plaintiff, at the end of each taxable year, accrued bonuses on its books in the year declared, and on its income tax returns in the year paid.

(ii) Under plaintiff's bonus plan applicable to all wage dividends paid *subsequent to 1945*, it has each year declared cash bonuses which are regularly paid to its eligible employees in March of the following year. Under that plan, an employee's entitlement to a declared bonus and the amount thereof were unaffected by events subsequent to the end of the year in which the bonus was declared. With respect to all bonuses under that plan, plaintiff, at the end of each taxable year, has accrued on its books and income tax returns the bonuses declared during that taxable year which were to be paid in the following taxable year. No issue is herein raised as to the propriety of the accrual of these bonuses.

(c) *Vacation pay.*—

(i) Under plaintiff's vacation pay plan applicable to all vacation pay payments made during *1953* and in *all years prior* thereto, it has each year granted vacations with pay to qualified employees. Under those plans, an employee's entitlement to a vacation with pay arose in the same year in which the vacation was taken and payment was made. With respect to all vacations to which employees became entitled under those plans, plaintiff, at the end of each taxable year, accrued vacation pay on its books and on its income tax returns in the year in which the vacation pay was paid.

(ii) Under plaintiff's vacation pay plan applicable to all vacation pay payments made *subsequent to 1953*, it has each year granted, to qualified employees, vacations to be taken in the following year with pay. Under that plan, an employee's entitlement in one year to a vacation in the following year was unaffected by events

subsequent to the year in which the employee became entitled to a vacation, though the vacation pay rate was dependent upon subsequent events since it was based upon either the rate in effect at the end of the year in which the employee became entitled to a vacation or upon the rate in effect at the time the vacation was taken, whichever was greater. With respect to all vacations to which employees became entitled under that plan, plaintiff, at the end of each taxable year, has *estimated* and accrued on its books and income tax returns the vacation pay for vacations to which employees became entitled during that taxable year, which were to be taken in the following year. No issue is herein raised as to the propriety of the accrual of this vacation pay.

10. The circumstances under which "year-end" wages were paid had been the same since prior to 1944. Those under which a current year's bonuses were paid had been the same since the bonuses for 1945 that were paid in 1946. Earlier bonuses were not paid to employees who terminated their employment before the payment date. The circumstances under which vacation pay allowances were paid had been the same since those based on 1953 that were paid in 1954. Earlier vacation pay allowances were not paid to employees who terminated their employment without the required notice before the payment date.

11. Plaintiff's liabilities for "year-end" wages earned in one fiscal year and paid in the following year have always been accrued in the previous year, both on its books and on its income tax returns. Since 1945 its liabilities for declared bonuses, and since 1953 its liabilities for vested vacation pay, have always been expensed in the year preceding the year in which paid, both on its books and on its income tax returns. Earlier bonuses and vacation pay allowances were deducted on plaintiff's tax returns in the year in which paid.

12. For each year since 1944 with respect to "year-end" wages, since 1945 with respect to bonuses, since 1953 with respect to vacation pay, plaintiff has estimated and deducted payroll taxes (FICA, FUTA, and state unemployment taxes), both on its books and on its income tax returns, in the year in which the underlying compensation was accrued.

13(a). With respect to "year-end" wages earned in all years prior to 1944, it was plaintiff's practice to accrue those

wages in the year they were earned, and to deduct payroll taxes thereon in the year in which those wages were paid. With respect to "year-end" wages earned in 1944 and all subsequent years, it has been plaintiff's practice to accrue those wages and deduct payroll taxes thereon in the year those wages were earned. Accordingly, in 1944, plaintiff "doubled up" on the payroll tax deduction, deducting both the payroll taxes on such wages earned in 1943, which wages were paid in 1944, and the payroll taxes on such wages earned in 1944, which wages were to be paid in 1945.

(b) With respect to bonuses declared in all years prior to 1945, it was plaintiff's practice, for federal income tax purposes, to accrue the amount thereof, and deduct payroll taxes thereon, in the year in which those bonuses were paid: this even though for book purposes it accrued such bonuses in the year declared. With respect to bonuses declared in 1945 and all subsequent years, it has been plaintiff's practice to accrue the amount thereof, and deduct the payroll taxes thereon, in the year in which those bonuses were declared. Accordingly, in 1945, plaintiff "doubled up" on the bonus accrual and the payroll tax deduction, accruing both the bonuses declared in 1944, which bonuses were paid in 1945, as well as deducting payroll taxes thereon, and the bonuses declared in 1945, which bonuses were to be paid in 1946, as well as deducting the payroll taxes thereon.

(c) With respect to all vacation pay payments made in all years prior to and during 1953, it was plaintiff's practice to accrue that vacation pay and deduct payroll taxes thereon in the year that vacation pay was paid. With respect to all vacations to which employees became entitled in 1953 and each subsequent year, which vacations were to be taken with pay in the respective following year, it has been plaintiff's practice to accrue that vacation pay and deduct payroll taxes thereon in the year in which the employee became entitled to the vacation. Accordingly, in 1953, plaintiff "doubled up" on the vacation pay accrual and payroll tax deduction, accruing the vacation pay paid in 1953, as well as deducting payroll taxes thereon, and accruing the vacation pay to be paid in 1954 (as the result of employees' entitlement to vacations in 1953), as well as deducting the payroll taxes thereon.

14(a). The amount of plaintiff's 1944 deduction of payroll taxes on "year-end" wages, as described in finding 13(a), *supra*, was not separately identified in the 1944 income tax return or the accompanying schedules, though Schedule M of that return contained an adjustment of $7,787.52 as an "additional provision for unemployment taxes." The computation of the figure $7,787.52, while not detailed in Schedule M, was set forth in plaintiff's 1944 federal income tax workpapers which were made available to the Internal Revenue agent in connection with the audit of the 1944 return, as follows.

Allowable Deduction for Income Tax Purposes

Federal Unemployment Tax per Form 940—1944	$218, 080. 71
Contributions Paid to States for 1944 per Form 940	1, 890, 887. 20
Contributions for Week Ended 12/30/44 Paid in 1st Quarter 1945 per Schedule attached	35, 334. 00
Allowable Deduction 1944	$2, 144, 301. 91
Charged to 1944 Book Profits	2, 136, 514. 39
Additional Deduction—Sch. M Adj	$7, 787. 52

Summary

	Federal Unemployment	*State Unemployment*
Tax paid per Form 940	$218, 080. 71	$1, 890, 887. 20
Tax for week ended 12/30/44	3, 643. 00	31, 691. 00
Total	$221, 723. 71	$1, 922, 578. 20
		221, 723. 71
		$2, 144, 301. 91

While the above computations referred to payroll tax "Contributions for the Week Ended 12/30/44 paid in 1st Quarter 1945 per Schedule attached" in the amount of $35,334, the schedule attached thereto referred instead to "Taxable wages for week ended 12/30/44 paid in 1945" in that amount. Further, the above computation, which pertained only to "unemployment" taxes, neither identified nor included FICA taxes.

With reference to the $7,787.52 item identified in Schedule M as "additional provision for unemployment taxes," the

Internal Revenue agent's audit report states "Additional accrual allowable." There was no indication given to plaintiff, other than as stated above, that the propriety of plaintiff's 1944 accrual of payroll taxes was being considered by the Service in connection with the 1944 audit, nor was any such issue raised in that audit.

(b) The amount of plaintiff's 1945 deduction of payroll taxes on accrued-but-unpaid bonuses, as described in finding 13(b), *supra*, was not separately identified in the 1945 income tax return or the accompanying schedules, nor was any adjustment for payroll taxes made in Schedule M similar to that for 1944 as described in finding 14(a), *supra*, of the return, though plaintiff's federal income tax workpapers, which were made available to the Internal Revenue agent in connection with the audit of the 1945 return, contain the following:

Allowable Deduction for Income Tax Purposes

Federal Unemployment Tax per Form 940—1945	$213, 622. 08
Contributions paid to state in 1944* per 940	1, 188, 778. 89
Contributions paid for week ended 12/29/45 paid in first quarter 1946 per schedule attached	32, 371. 00
Less: Contributions paid for week ended 12/30/44 paid in 1945—see Inc. Tax w/p for 1944 (page 41)	(35, 344. 00)
Estimated unemployment tax on 1945 wage dividend [bonus]	57, 800. 00
Allowable Deductions 1945	$1, 457, 207. 97
Schedule M Adjustments—Additional Deductions	$2, 645. 43
No adjustment made—*follow books*	

Summary

	Federal Unemployment	*State Unemployment*
Tax paid per Form 940	$213, 622. 08	$1, 188, 778. 89
Tax for week ended 12/29/45	3, 683. 00	28, 688. 00
Tax for week ended 12/30/44	(3, 643. 00)	(31, 691. 00)
	$213, 662. 08	$1, 185, 775. 89

*The parties agree that the year properly referred to is 1945 instead of 1944.

While the above computation referred to payroll tax "Contributions for the week ended 12/29/45 paid in first quarter 1946 per schedule attached," in the amount of $32,371, the "Schedule" attached thereto referred instead to "Unemployment Tax Paid for Week Ending 12–31–45" in the same amount. Further, the above computation, which pertained only to "unemployment" taxes, neither indentified nor included FICA taxes.

There was no indication given to plaintiff that the propriety of its 1945 deduction of payroll taxes was being considered by the Service in connection with the 1945 audit, nor was any such issue raised in that audit.

(c) The amount of plaintiff's 1953 deduction of payroll taxes with respect to vacations to which employees became entitled in 1953 to take with pay in 1954, as described in finding 13(c), *supra*, was not separately identified in the 1953 income tax return or the accompanying schedules, nor was any adjustment for payroll taxes made in Schedule M similar to that for 1944, as described in finding 14(a) *supra*, of the return, nor did plaintiff's 1953 federal income tax workpapers separately identify those payroll taxes.

There was no indication given to plaintiff that the propriety of its 1953 deduction of payroll taxes was being considered by the Service in connection with the 1953 audit, nor was any such issue raised in that audit.

15. In conjunction with its federal income tax returns for 1944, 1945 and 1953, on which it first deducted payroll taxes attributable to "year-end" wages, bonuses, and vacation pay, respectively (having theretofore only deducted such taxes as were attributable to underlying compensation that had been paid), plaintiff did not attach or otherwise submit any specific request to the Commissioner of Internal Revenue for approval of such deductions accompanied by a statement of the facts on which it relied to support those deductions.

16. Each of plaintiff's federal income tax returns from 1944 to 1964, inclusive, was audited by the Internal Revenue Service. No issue is raised as to the propriety of plaintiff's accrual of "year-end" wages, bonuses or vacation pay for any of those years. In none of the audits prior to the one for 1964 was any issue raised as to the propriety of plaintiff's deduc-

tion of payroll taxes on "year-end" wages, bonuses or vacation pay.

17. The following schedule shows the amounts of payroll taxes which plaintiff deducted for 1964 on compensation not paid in that year, and the amounts of payroll taxes that plaintiff deducted for 1953 on compensation not paid in 1953, stated separately for each type of tax and each type of compensation, and, finally, the difference between the 1964 and 1953 totals:

	"Year-end" Wages	*Bonuses*	*Vacation Pay*	*Totals*
FICA 1964	$17,471	$1,514,126	$340,184	$1,871,781
FUTA "	3,074	168,609	15,382	187,065
S.U.T. "	10,275	698,571	68,110	776,956
Total	$30,820	$2,381,306	$423,676	$2,835,802
FICA 1953	$7,446	$447,763	$126,731	$581,940
FUTA "		69,689	14,064	83,753
S.U.T. "		220,802	35,034	255,836
Total	$7,446	$738,254	$175,829	$921,529
Total Net				$1,914,273

18. About 90 percent of the total payroll taxes that plaintiff deducted on unpaid compensation for 1964 was allocable to manufacturing divisions, and was recorded as part of cost of goods sold or year-end inventory.

19. At the end of each taxable year, plaintiff computes its deduction of payroll taxes on accrued-but-unpaid compensation by separate calculations made for each major plant (of which there were fourteen in 1964) and for each type of tax (FICA, FUTA, and state unemployment tax) as applied to the totals of each type of accrued-but-unpaid compensation ("year-end" wages, bonuses, and vacation pay). Each calculation involves two steps—an *estimation* of the total amount of each type of compensation which, when paid in the following year would be subject to payroll tax, and a determination or estimation of the applicable payroll tax rate. This method of calculation is described in greater detail in the following subparagraphs:

(a) For each of plaintiff's plants, a percentage for each type of payroll tax (FICA, FUTA, state unemployment tax) was applied to each type of compensation

accrued by that plant, *i.e.*, one percentage rate for each type of tax was applied by each plant to its total accrual of "year-end" wages, one percentage rate for each type of tax was applied by each plant to its total accrual of bonuses and one percentage rate for each type of tax was applied by each plant to its total accrual of vacation pay. In each case, the percentage rate applied by plaintiff was generally derived from a comparison of the total of each type of compensation paid by each plant during the previous year with the total of each type of that previous year's compensation which, when paid by each plant, was subject to each type of payroll tax. In effect, the percentage applied by plaintiff represented the overall proportion of similar compensation for the previous year which, when paid, did not exceed the statutory payroll tax dollar ceilings in effect for each type of tax at the time that the underlying compensation was paid. (The payroll tax statutes for FICA, FUTA, and state unemployment payroll taxes apply only to the compensation paid in a payroll tax year to such employee up to a certain fixed dollar ceiling, which, for example, for 1965 payments was $4,800 under FICA, $3,000 under FUTA, and amounts ranging from $3,000 to $4,500 under the various state statutes.)

By multiplying each type of the current year's accrued-but-unpaid compensation by the applicable percentage (described above), plaintiff estimated that portion of the current year's accrued-but-unpaid compensation which, when paid, would be subject to payroll tax.

(b) The amounts of the current year's accrued-but-unpaid compensation which plaintiff estimated (in the manner described above) would, when paid, be subject to payroll tax, was then multiplied by the applicable payroll tax rate. The applicable payroll tax rate for FICA taxes was obtained directly from the Internal Revenue Code (*see*, Sec. 3111). The applicable payroll tax rate for FUTA taxes was also obtained from the Internal Revenue Code (*see*, Sec. 3301), since plaintiff calculated the tax by assuming the maximum statutory credit for contributions to state funds (*see*, Sec. 3302). With respect to state unemployment tax rates, in the case of New York State, for example, where the predominant amount of plaintiff's state unemployment tax is paid, an employer's rate for each calendar year is determined on the basis of his account status as of September 30 of the prior year adjusted for benefit charges at the end of the prior calendar year. Plaintiff maintains a record of all benefit charges, as well as a record of tax payments made

to the unemployment insurance fund. On the basis of that information plaintiff estimated the payroll tax rate. Similar procedures were followed for such other states as California, Georgia, Texas, and Hawaii. New Jersey, Ohio, Tennessee and Illinois use a rate computation date ending on June 30. Accordingly, in those states, the rates applicable to wage payments in the first six months of 1965 were known. Plaintiff assumed that the rates applicable to the last six months were the same.

20. After the issue of plaintiff's accrual of payroll taxes was raised on the audit of plaintiff's 1964 federal income tax return, plaintiff made a survey of its records to review the payroll taxes actually paid in 1965 and 1966 on compensation accrued in 1964 and paid in 1965, as compared with the payroll taxes deducted in 1964 on such compensation. The year 1966 is implicated, with respect to plaintiff's 1964 employment tax accruals, because the actual payment of those taxes did not altogether occur in 1965, the next succeeding year. There is this lag, in the case of FICA, because that tax is by law payable by or before the last day of the first calendar month following the calendar quarter in which cognizable compensation was paid. [*See* Secs. 6011, 6071, and 6151 of the 1954 Code and Employment Tax Regulations Secs. 31.-6011(a)–1, 31.6071(a)–1(a), and 31.6151–1(a).] A similar situation obtains in the case of FUTA although the taxable period there is annual rather than quarterly. [*See* Secs. 6011, 6071, and 6151 of the 1954 Code and Employment Tax Regulations Secs. 31.6011(a)–3, 31.6071(a)–1(c), and 31.6151–1 (a).] Thus, the FUTA taxes that plaintiff accrues under the practice that it has adopted are typically not paid until the beginning of the second year following the accrual. Moreover, the due date for payment of state unemployment taxes generally parallels that for FICA taxes. [*See* for California, Unemployment Insurance, WEST'S ANN. CALIF. CODES, § 1110(a); for Illinois, SMITH-HURD ILL. ANN. STAT., ch. 48, § 559.] For New York, Tennessee, New Jersey and Texas, the state statutes make no specific provision but instead provide authority for the promulgation of regulations in this regard. [*See* for New York, Labor Law, MCKINNEY'S CONSOL. LAWS OF N.Y. ANN., § 570(1); for Tennessee, TENN. CODE ANN., § 50–1326; for New Jersey, N.J. STAT. ANN., § 43.21–(7)(a)

(1); for Texas, VERNON'S TEX. CIVIL STAT. ANN., Art. 5221b–5 (a).]

The results of the survey indicated that the total taxes actually paid on such compensation were $2,840,775, as compared with the total taxes deducted of $2,835,802, reflecting a consolidated negative variance of less than 0.18 percent. For each of the three types of taxes considered separately, the results indicated a negative variance for FICA taxes of about 2 percent, a positive variance for FUTA of about 4 percent, and a positive variance for state unemployment taxes of about 4 percent. Additionally, plaintiff made comparisons for seven years, 1963–1969, of the FICA taxes deducted on bonuses with those actually paid on such bonuses in the following year—this representing by far the largest element in the disputed accrual. The results of this survey indicated that the average variance for the seven years was about 1.1 percent and the greatest variance for any one of the years was about 3.5 percent.

21. Plaintiff calculated its total payroll tax deductions for each year as the sum of taxes on compensation paid plus taxes on compensation accrued and unpaid, reduced by the taxes accrued for the preceding year on compensation accrued and unpaid in that year. This method of calculation had the effect of compensating in the following taxable year for errors resulting from plaintiff's estimation in the previous taxable year of the amount of payroll taxes with respect to compensation accrued but unpaid as of the end of that previous taxable year.

22. In the opinion of qualified accounting experts, both the treatment of payroll taxes asserted by plaintiff (*i.e.*, that payroll taxes should be deducted when the underlying compensation is accrued) and the treatment of payroll taxes asserted by the defendant (*i.e.*, that payroll taxes should be deducted when the underlying compensation is paid) are in accordance with the generally accepted commercial accounting principles, and the use of both methods is widespread in commercial accounting practice. Plaintiff's treatment of these payroll taxes is generally preferred in theory for commercial accounting purposes in recognition of the association of payroll taxes to the underlying compensation and in an effort to match costs and revenues within a period.

Syllabus

ULTIMATE FINDINGS OF FACT

23. Plaintiff has shown that by the end of 1964 there occurred all events necessary both to fix with certainty the fact of liability *and* to reasonably ascertain the payroll taxes on "year-end" wages for individual employees.

24. Plaintiff has not demonstrated that there occurred by the end of 1964 all events necessary to fix the fact of liability with regard to payroll taxes on bonuses and vacation pay for individual employees.

CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff *is entitled* to a 1964 income tax deduction for payroll taxes on "year-end" wages, and that plaintiff *is not entitled* to a 1964 income tax deduction for payroll taxes on bonuses and vacation pay. The amount of the recovery will be determined pursuant to Rule 131(c). Further, the court hereby remands the case to the trial division for additional proceedings consistent with the above, including the extent to which, if at all, the present result creates a double disallowance of the same payroll tax items for purposes of computing plaintiff's 1964 taxable income.

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532 F. 2d 1344

FRANCIS COLLINS v. THE UNITED STATES

[No. 238-73. Decided April 14, 1976]

OPINION

Taxes; payment of tax liabilities of another; duress; implied contract.—Plaintiff, a former owner of Summertime Cafe, Inc., seeks to recover amounts he paid to satisfy the proposed income and excise tax deficiencies of said corporation for years 1964 and 1965. By an agreement dated August 3, 1965 plaintiff sold the stock of the corporation. In 1968 the Internal Revenue Service audited the corporation's Federal income tax returns for 1964 and 1965. During conferences with IRS officials but without the presence of legal counsel, it was allegedly represented to plaintiff that he was personally liable for certain proposed corporate tax deficiencies. Plain-

Syllabus

tiff was asked to produce a copy of the sale agreement which would have resolved this problem, but he declined to do so. Prior to and at the time of payment of the deficiencies in September 1969, plaintiff was represented by counsel. Plaintiff contends that the taxes were paid as the result of duress applied by the IRS. The court assumes jurisdiction to determine whether the circumstances surrounding acceptance of the payment created a contract implied in fact even though plaintiff was not a taxpayer entitled to maintain an action for overpayment of taxes. It is *held* that plaintiff was a volunteer since he has not sustained his burden of proving that payment was involuntary; that none of the elements forming the basis of a charge of duress are present; and that under the circumstances no contract implied in fact existed. Since this court's jurisdiction over implied contracts is limited to contracts implied in fact, plaintiff has presented no claim over which this court can exercise its jurisdiction.

Court of Claims jurisdiction; generally.

[1] In an action by party A to recover an amount tendered by him to satisfy the tax liabilities of party B, the Court of Claims will assume jurisdiction under 28 U.S.C. § 1491 to consider whether the circumstances surrounding payment form a basis for a possible contract implied in fact between the Internal Revenue Service and party A, since the latter being a nontaxpayer must establish independent jurisdictional grounds for his action.

Internal Revenue ⇐ 2004

Taxes; claim for refund; payment of tax liability of another.

[2] A party who has paid the tax liabilities of another cannot recover the amount of the payment if it was voluntary, and he bears the burden of proving some element which would remove him from the category of volunteer.

Internal Revenue ⇐ 2001

Duress; what constitutes.

[3] To make out a charge of duress, it must be demonstrated that one side involuntarily accepted the terms of another, that circumstances permitted no other alternative, and that the circumstances were the result of coercive acts of the opposite party.

Contracts ⇐ 95(1)

Duress; what constitutes.

[4] Even if payment by plaintiff of the corporate tax liability was made as the result of an alleged representation by an Internal Revenue Service official that plaintiff was personally liable for the proposed corporate deficiency, absent evidence that plaintiff involuntarily acquiesced in the representation, duress has not been demonstrated since plaintiff could have produced the subject sales agreement which would have resolved the matter or he could have opposed the imposition of the deficiency.

Internal Revenue ⇐ 2014

Syllabus

Taxes; claim for refund; relief in equity; ignorance.

[5] Ignorance is never sufficient to constitute a ground of relief if it appears that the requisite knowledge might have been obtained by reasonable diligence. He who averts knowledge to himself cannot later claim lack of knowledge.

Internal Revenue ⇐ 2013

Duress; what constitutes.

[6] To find duress, the coercive acts must be of such a nature that they are sufficient to overpower the free will of the plaintiff and to prevent any other course of action. Where plaintiff was represented by tax counsel prior to and at the time of payment of the tax deficiency of another, a misrepresentation of law by a Government official that plaintiff was personally liable for the proposed deficiency, cannot form the basis for a finding of duress. Although payment may have been the result of a misrepresentation of law, once counsel was retained prior to actual payment, any prior misrepresentation is irrelevant.

Contracts ⇐ 95(1)

Internal Revenue ⇐ 2014

Contracts; implied contracts; implied in law.

[7] A claim founded on a mistake as to a legal duty owed is essentially an action in restitution; restitution based on a mistake of law is allowable only if the recipient of the funds in issue has notice of the mistake as to legal duty, knows that no such duty is owed, and knows that the transfer was made on the basis of a misconceived duty. Restitution on this basis is grounded on a contract implied in law over which this court lacks jurisdiction.

Money Received ⇐ 6(8)

Contracts; implied contracts; implied in fact.

[8] A contract implied in fact exists only where the circumstances illustrate that the equivalent of mutual assent is present. Where there is no evidence of an involuntary acceptance of the terms represented by the Government official as to plaintiff's liability for the proposed tax deficiency of another, plaintiff never indicated that he was reluctant to pay the deficiency, and in fact after retaining legal counsel he reaffirmed his willingness to pay the same, and since plaintiff's case is based solely on unproved charges that he was coerced into paying the tax, the circumstances form no basis for a contract implied in fact.

Contracts ⇐ 4

Internal Revenue ⇐ 2011

Peter B. Sang, attorney of record, for plaintiff.

Patricia B. Tucker, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser* and *Robert S. Watkins*, of counsel.

207-954—77——28

Opinion of the Court

Before NICHOLS, KASHIWA, and KUNZIG, *Judges*.

KASHIWA, *Judge*, delivered the opinion of the court: *

This is an action to recover $3,748.85, plus interest, which represents the amount paid by the plaintiff, Francis Collins, to the Internal Revenue Service to satisfy the proposed income and excise tax deficiencies of Summertime Cafe, Inc., for the years 1964 and 1965. For the reasons stated below, we hold for the defendant.

The plaintiff purchased Summertime Cafe, Inc., in December, 1963. Its principal asset was a seasonal liquor license. The corporation operated a nightclub, the Candy Lounge, from April 1 to November 30 during each of the years 1964 and 1965. By an agreement dated August 3, 1965, Mr. Collins sold the stock of the corporation to Harold Loew.

In the spring of 1968, Mr. Collins was contacted by Revenue Agent D. E. Harrington, who was conducting an audit of Summertime Cafe, Inc.'s, federal income tax returns for 1964 and 1965. The main item under consideration was the band expense deduction claimed for each year. In connection with this audit, Mr. Collins made available to Mr. Harrington the receipts signed by the individual band leaders and also copies of his own personal tax returns for 1964 and 1965. After a review of the receipts, Mr. Harrington told Mr. Collins that the deductions claimed for band expenses were doubtful but that, if the deductions were allowed, the question of cabaret taxes would arise.

Mr. Collins received two revenue agent's reports in May, 1969, in which deficiencies were proposed with respect to Summertime Cafe, Inc.'s, and Mr. Collins' personal income taxes for the years 1964 and 1965. The report addressed to Summertime Cafe, Inc., in care of Mr. Collins proposed the disallowance of the claimed band expense deductions of the corporation plus a negligence penalty for the years 1964 and 1965, and other minor adjustments for 1965. The report addressed to Mr. Collins proposed an adjustment for his personal income taxes based on the inclusion of income in the amount of the disallowed band expenses for each year as a constructive dividend to Mr. Collins. An additional item

*We reach a contrary result to the recommended opinion of Trial Judge C. Murray Bernhardt.

for 1964 was Mr. Collins' receipt of unreported tip income in the amount of $135.

At Mr. Collins' request a conference was scheduled between John MacDonald, District Conferee, and Mr. Collins to consider the proposed tax deficiencies of both Summertime Cafe, Inc., and Mr. Collins. In preparation for this conference, Mr. MacDonald reviewed the case files and researched case law dealing with the substantiation of claimed expenses. At the first conference with Mr. Collins, Mr. MacDonald reviewed the cases with Mr. Collins and noted that a question existed with respect to whether Mr. Collins had sold the stock or the assets of the corporation. Mr. MacDonald explained that Mr. Collins might be liable for the corporate taxes if he had sold the assets of the corporation. Conversely, as Mr. MacDonald explained, if the stock had been sold, the continuing corporation would be liable for the corporate deficiencies, although the purchasers might look to Mr. Collins for reimbursement if the contract contained a warranty clause. In order to resolve these questions, Mr. MacDonald asked Mr. Collins for a copy of the sale document. In response to this explanation, Mr. Collins became visibly agitated and stated that he did not want to go into the sale and that he would pay the taxes.

The remainder of the first conference and the other three conferences between Mr. Collins and Mr. MacDonald concerned the amount of taxes due from the corporation and from Mr. Collins. Mr. MacDonald requested the band receipts and other information pertaining to the band expense deductions in issue. On the basis of the information provided, Mr. MacDonald concluded that the band expense deductions claimed by the corporation were allowable.

As Mr. MacDonald had explained to Mr. Collins at their first conference, if the band expense deductions were allowed, an excise (cabaret) tax[1] would then become due. The amounts of corporate cabaret and income tax deficiencies were computed and the imposition of a 25 per cent penalty

[1] Under Section 4231 (6) of the Internal Revenue Code of 1954, Ch. 33, 68A Stat. 497 (repealed by the Excise Tax Reduction Act of 1965, P.L. 89-44, Title III, § 301, 79 Stat. 136, 145, effective December 31, 1965), a cabaret excise tax was imposed on the receipts of establishments which provided live music or similar entertainment. The tax imposed was 10 per cent of the gross receipts during the period in which such entertainment was provided.

for failure to file the required cabaret tax returns was proposed. The allowance of the band expense deductions at the corporate level eliminated the proposed constructive dividend to Mr. Collins. Consequently, the only remaining adjustment was the unreported tip income which resulted in a tax deficiency of under $30.

About a week after their last conference, Mr. Collins informed Mr. MacDonald that he had retained legal counsel to assist him with respect to the proposed deficiencies. On August 26, 1969, Mr. Collins executed a power of attorney form authorizing Peter Sang to represent him before the Internal Revenue Service. Thereafter, Mr. Collins' attorney handled all substantive matters concerning the proposed deficiencies.

Mr. Collins' attorney and Mr. MacDonald had one conversation relating to the proposed penalties for failure to file the required cabaret tax returns. After the conversation an affidavit explaining the failure to file the required returns and reaffirming Mr. Collins' willingness to pay the corporate deficiencies was submitted. The affidavit was signed by both Mr. Collins and his attorney. Based on the information contained in the affidavit, Mr. MacDonald recommended that penalties for the failure to file cabaret tax returns not be imposed.

On or about September 12, 1969, Mr. Collins paid the proposed income and cabaret tax deficiencies of Summertime Cafe, Inc., for 1964 and 1965 in the total amount of $3,748.85. In the present action Mr. Collins seeks the recovery of these amounts plus interest.

This is an action for the recovery of amounts paid by the plaintiff to satisfy the proposed tax deficiencies of Summertime Cafe, Inc. This case involves the further consideration of the right of the Internal Revenue Service to accept and retain amounts offered by a third party to satisfy the tax liabilities of a separate entity. Initially, we note that the plaintiff has not argued that Summertime Cafe, Inc., did not owe the income or excise taxes paid or that the taxes were excessive in amount. The plaintiff's position appears to be that the Internal Revenue Service has no right to retain the amounts he tendered to satisfy the proposed corporate deficiencies.

The principal issue is whether the plaintiff was a volunteer in paying the taxes of Summertime Cafe, Inc.

Plaintiff states that jurisdiction is conferred upon the court by 28 U.S.C., Section 1491, citing *Fidelity & Casualty Co.* v. *United States*, 203 Ct. Cl. 486, 490 F. 2d 960 (1974). The *Fidelity* case, like this case, involved an action for the recovery of amounts tendered by the plaintiff to satisfy the tax liabilities of another party. In that case the court assumed jurisdiction to determine whether the circumstances surrounding the acceptance of the payment in issue created a contract implied in fact even though the plaintiff was not a taxpayer entitled to maintain an action for the overpayment of taxes.[2]

It is the defendant's position that the circumstances surrounding payment in this case do not support any finding of a contract implied in fact. We assume jurisdiction to consider this question. *Cf. J. C. Pitman & Sons, Inc.* v. *United States*, 161 Ct. Cl. 701, 317 F. 2d 366 (1963); *Ralston Steel Corp., Assignee* v. *United States*, 169 Ct. Cl. 119, 340 F. 2d 663, *cert. denied*, 381 U.S. 950 (1965).

In order to consider this question, we first have to examine the voluntariness of plaintiff's payment. In cases involving the payment of tax liabilities by a third party, it is fundamental that the plaintiff cannot recover if the payment in issue was voluntary and the plaintiff bears the burden of proving some element which would remove him from the category of volunteer. In *Fidelity & Casualty Co.* v. *United States*, *supra*, we held:

> Even viewed in a light most favorable to plaintiff, the actions of IRS in the circumstances surrounding payment of the taxes by plaintiff cannot be considered so overpowering as to have inhibited plaintiff from the unfettered exercise of its reasoned judgment. * * * [203 Ct. Cl. at 497, 490 F. 2d at 966.]

* * * * *

[2] In order to maintain an action for the refund of taxes under the Internal Revenue Code, the plaintiff must be the taxpayer who has overpaid his own taxes. See *Economy Plumbing & Heating Co.* v. *United States*, 200 Ct. Cl. 31, 470 F. 2d 585 (1972). In this case the taxpayer was Summertime Cafe, Inc., and there is no claim here that the amounts paid were not actually due from the corporation. The plaintiff, a nontaxpayer, must establish independent jurisdictional grounds for his action.

> There are no circumstances in this case whereby a contract implied in fact can be established based on the dealings between IRS and the plaintiff. Plaintiff has failed to carry its burden in this regard, and it must be placed in the fatal category of a volunteer.* * * [203 Ct. Cl. at 498, 490 F. 2d at 967.]

See *J. C. Pitman & Sons, Inc.* v. *United States*, *supra; Combined Industries, Inc.* v. *United States*, 83 Ct. Cl. 613, 15 F. Supp. 349 (1936); *Central Aguirre Sugar Co.* v. *United States*, 77 Ct. Cl. 17, 2 F. Supp. 538 (1933).

Plaintiff's main contention appears to be that the deficiencies proposed against Summertime Cafe, Inc., were paid as the result of duress applied by the Internal Revenue Service. We have considered the question of duress in a wide variety of situations and in *Fruhauf Southwest Garment Co.* v. *United States*, 126 Ct. Cl. 51, 62, 111 F. Supp. 945, 951 (1953), summarized its conclusions as follows:

> * * * three elements are common to all situations where duress has been found to exist. These are: (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. * * *

Even if the plaintiff's version of the disputed facts is accepted, we find that none of these elements can be found here.

First of all we find that there is no evidence of the involuntary acceptance of terms dictated by the Internal Revenue Service. Even if the payment in issue was made as the result of Mr. Harrington's alleged statement that Mr. Collins was personally liable for the proposed corporate tax deficiencies, there is no indication that Mr. Collins *involuntarily* accepted these terms. To the contrary we find that Mr. Collins, who could have obtained a copy of the sale agreement at any time from the attorney who prepared the sale agreement, did not produce the document for Mr. Harrington and refused to produce it for Mr. MacDonald. Much has been said of a mistake in this case on plaintiff's part. A copy of the sale agreement would have answered all questions. Ignorance is never sufficient to constitute a ground of relief if it appears that the requisite knowledge might have been obtained by

reasonable diligence. *United States* v. *Ames*, 99 U.S. 35, 47 (1878). He who averts knowledge to himself cannot later claim lack of knowledge. This is elementary. Mr. Collins further testified that he never told Mr. MacDonald that he was in any way reluctant to pay the corporate taxes. In fact, after retaining legal counsel Mr. Collins reaffirmed his willingness to pay the corporate taxes in an affidavit which was signed by both Mr. Collins and his attorney and submitted to Mr. MacDonald prior to the payments in issue. As Mr. Collins testified, he figured that it would be easier to pay the tax than to fight it. Moreover, Mr. Collins' decision to pay the taxes in question may very well have been made in the belief of his liability for the corporate taxes under the contract for the sale of the stock. We hold that the evidence is not sufficient in this case to support a finding that the plaintiff's acquiescence to Mr. Harrington's alleged representation that he was liable for the corporate taxes (even if the payment in issue is found to be the result of such statement) was in any way involuntary. The plaintiff, who averted knowledge to himself as above indicated, cannot claim that his acquiescence was involuntary.

Secondly, contrary to the plaintiff's assertions, other alternatives were available. The payments in issue were made as part of a district conference settlement. If agreement had not been reached at that level, an appellate conference could have been scheduled or a notice of deficiency could have been issued and a petition filed in the United States Tax Court. Mr. Collins' attorney, who handled these cases prior to the payment in issue, was certainly aware of the alternatives to making the payment at the district conference level.

The final element essential to a finding of duress is that the circumstances which permitted no other alternative (assuming that this element were otherwise established) were the result of coercive acts of the opposite party. The coercive acts referred to must be of such a nature that they are sufficient to overpower the free will of the plaintiff and to prevent any other course of action. In *Beatty* v. *United States*, 144 Ct. Cl. 203, 206, 168 F. Supp. 204, 206–207 (1958), we stated as follows:

> A party is always entitled to say that if his offer is not accepted, he will avail himself of his legal rights; it

> is only the threat of a wrongful or unlawful act that may constitute duress. Such a threat will amount to duress only if it is sufficient to overpower the will of the other party and prevent the free exercise of his will. * * *

See *Fruhauf Southwest Garment Co.* v. *United States*, *supra*, 126 Ct. Cl. at 64, 111 F. Supp. at 952.

We hold that the record here is completely devoid of any coercive actions by agents of the Internal Revenue Service. At best the plaintiff has demonstrated only a misrepresentation of law by Mr. Harrington. Where, as here, the plaintiff was represented by tax counsel prior to and at the time of the payment in issue, misrepresentation of law cannot form the basis for a finding of duress. In *Mills* v. *United States*, 187 Ct. Cl. 696, 700, 410 F. 2d 1255, 1257–1258 (1969), we held:

> Even if the plaintiffs could show misrepresentation of law, we could not grant the relief requested. In the absence of unusual circumstances, representations as to questions of law form no basis for setting aside a contract. * * * Ordinarily one having need of legal advice will retain counsel and not take it from the other side of the negotiating table. * * *

The lapse of 18 months between the alleged misrepresentation by Mr. Harrington and the payment in issue further negates any inference of urgency or coercion necessary to a finding of duress. If the intervening events—Mr. MacDonald's explanation of the tax consequences of the different types of sales and the retention of and reliance upon tax counsel by Mr. Collins—are considered, the impact of Mr. Harrington's statements are even more attenuated. Even if the payments in issue were made as the result of these statements, as the plaintiff contends, we hold that the statements, at best, constitute merely a misrepresentation of law insufficient to constitute duress under the decisions of this court.

While, in certain cases, actions have been maintained for the recovery of amounts used to satisfy the liabilities of another person, such instances of recovery have been limited to those cases in which the actions of the agents of the Government are so egregious as to constitute a fraud on the rights of the individual. See *United States* v. *State Bank*, 96 U.S. 30 (1877); *Kirkendall* v. *United States*, 90 Ct. Cl. 606, 31 F. Supp. 766 (1940). Conversely, the facts in this case illus-

trate not only that no such fraudulent actions occurred, but rather that the actions of the district conferee who accepted the payment in issue were correct and appropriate. It is our opinion that the payments in issue were accepted by Mr. MacDonald from an individual who—

> (1) had been informed that questions existed as to his personal liability for the corporate taxes;
> (2) had been offered assistance in making a determination as to his own liability;
> (3) refused such assistance;
> (4) orally stated that he was willing to pay the corporate taxes;
> (5) never indicated in any way that he was unwilling to pay the corporate taxes;
> (6) retained and relied upon tax counsel prior to making the payment; and
> (7) subsequently reaffirmed, in writing, his willingness to pay the corporate taxes under his signature and the signature of his attorney.

Under these circumstances we find that Mr. MacDonald's acceptance and retention of the payment in issue were entirely proper.

Plaintiff has argued that the payment in issue is the result of a misrepresentation of law made to an individual who was not represented by counsel.[3] If payment had been made to Mr. Harrington, the original agent, different problems might be presented. However, this is not the case here. Once counsel was retained, any prior misrepresentation is irrelevant. As this court noted in *Mills* v. *United States*, *supra*, 187 Ct. Cl. at 700, 410 F. 2d at 1258:

> * * * Ordinarily one having need of legal advice will retain counsel and not take it from the other side of the negotiating table. * * * The relationship of the parties was not such that it was reasonable for one side to have relied on the representations of the other.

[3] Although the plaintiff has made no legal argument on this point, several references have been made to a mutual mistake of fact in the plaintiff's brief. The evidence presented does not support this allegation. Mr. MacDonald, the district conferee who received the payment in issue, testified that he did not make a determination that Mr. Collins had sold the assets of the corporation after Mr. Collins declined to produce a copy of the sale agreement and stated that he was willing to pay the corporate taxes. To the contrary, Mr. MacDonald considered Mr. Collins to be making a voluntary payment. Consequently, any mistake made was unilateral in nature. Since Mr. Collins could have rectified this mistake at any time, he must bear the consequences of his inaction.

In essence plaintiff, with no reference to legal support whatsoever, is asking this court to hold that a misrepresentation of law made to an individual who was not represented by counsel cannot under any circumstances be remedied by later events. The multiple remedial actions present in this case dictate that the impact of Mr. Harrington's alleged statement was thoroughly dissipated by 18 months of intervening events. As we see this case, Mr. Collins, who could have produced the sale agreement at any time, made a decision that it was easier to pay the corporate taxes than to attempt to work out the question of liability. Having made this decision, Mr. Collins assumed the risk that he was in error as to his legal duty.

Subsequently, the plaintiff dealt with Mr. MacDonald to arrive at a figure for the corporate deficiencies with absolutely no indication to Mr. MacDonald that he was unwilling to pay the resulting figure. The failure to convey to Mr. MacDonald any reluctance Mr. Collins might have had is fatal here. Mr. MacDonald was certainly not on notice that Mr. Collins was making the payment in issue on the basis of a misconception of his duty, even if this were in fact the case.[4] To hold the Government responsible for the plaintiff's later change of mind would impose an unfair and unwarranted burden. See *J. C. Pitman & Sons, Inc.* v. *United States*, *supra*.

Under these circumstances, no contract implied in fact existed. A contract implied in fact exists only where the circumstances illustrate that the equivalent of mutual assent is present. *Porter* v. *United States*, 204 Ct. Cl. 355, 366, 496 F. 2d 583, 590–591 (1974), *cert. denied*, 420 U.S. 1004 (1975). Conversely, a contract implied in law is one in which a duty to make restitution is implied, regardless of the lack of mutual assent, for reasons of justice and equity. 1 CORBIN ON CONTRACTS, § 19 (2d ed. 1963). There is absolutely no indication of mutual assent in this case. Rather, plaintiff's

[4] A claim founded on a mistake as to a legal duty owed is essentially an action in restitution. Restitution based on a mistake of law is allowable only if the recipient of the funds in issue (1) has notice of the mistake as to legal duty; (2) knows that no such duty is owed; and (3) knows that the transfer was made on the basis of a misconceived duty. See RESTATEMENT, RESTITUTION, § 14(1), comment c (1958), and *J. C. Pitman & Sons, Inc.* v. *United States*, *supra*. None of these elements are present here. In any event, restitution on this basis is grounded on a contract implied in law over which this court has no jurisdiction.

case is based solely on unproved charges that plaintiff was "coerced" and that this case involved an instance of "IRS high-handedness." Since it cannot be shown that a contract implied in fact existed and since this court's jurisdiction over implied contracts is limited to contracts implied in fact, the plaintiff has presented no claim over which this court can exercise its jurisdiction and the petition is dismissed.

KUNZIG, *Judge*, dissenting:

In this cabaret excise tax refund suit the majority overturns the recommended decision of Trial Judge Bernhardt and denies plaintiff a recovery for taxes paid to defendant despite the fact that plaintiff was never liable to defendant for the taxes. The primary basis for the majority's holding is that plaintiff paid the tax as a "volunteer" on behalf of Summertime Cafe, Inc., and produced insufficient facts to warrant his recovery on an implied in fact contract because he did not make the tax payments under duress. I agree that plaintiff is not entitled to recover on an implied in fact contract theory in the instant case. However, I differ with the majority on a second phase of the case and would adopt Trial Judge Bernhardt's recommendation that plaintiff has established a right to recover based on section 7422(b) of the Internal Revenue Code of 1954.[1]

According to the majority, in order to maintain an action for the refund of taxes, the plaintiff must "be the taxpayer who has overpaid his own taxes." The court cites *Economy Plumbing and Heating Co.* v. *United States*, 200 Ct. Cl. 31, 470 F. 2d 585 (1972) for this proposition. Undoubtedly, "persons *who are not taxpayers* * * * within the system" have no standing to maintain a refund suit. *Economy Plumbing*, *supra*, 200 Ct. Cl. at 37, 470 F. 2d at 589. However, the majority opinion in the instant case conveniently ignores a crucial determination by the trial judge:

> In contrast to *Economy Plumbing*, the present plaintiff is clearly within the administrative system defined by the court because he was assessed a tax deficiency as a tax-

[1] A taxpayer may bring an action for a refund "whether or not such tax * * * has been paid under protest or duress." § 7422(b), Int. Rev. Code of 1954.

payer, had been formally audited as a taxpayer, paid the tax as a taxpayer, and filed and was denied his refund claim as a taxpayer.

Having treated plaintiff as a taxpayer at each stage of the administrative process, defendant should not now be heard to say that plaintiff is an "outside third party."

Defendant's "nontaxpayer" argument appears even more tenuous when one considers the fact that until the final stages of the administrative process plaintiff appeared *pro se*. Further, the record is totally silent as to any attempts by defendant to recover the tax from the proper party, Summertime Cafe, Inc. I would hold, as did the trial judge, that plaintiff has standing to maintain the present action as a taxpayer.

Clearly, if plaintiff is entitled to bring the instant action as a taxpayer it is irrelevant that he did not pay the tax under duress. § 7422(b), *supra*.

Moreover, although plaintiff cannot recover if he was a volunteer, *Fidelity & Casualty Co.* v. *United States*, 203 Ct. Cl. 486, 497, 490 F. 2d 960, 967 (1974), he need only prove "*some element* which would remove [him] * * * from the fatal category of pure volunteer." *J. C. Pitman & Sons, Inc.* v. *United States*, 161 Ct. Cl. 701, 706, 317 F. 2d 366, 369 (1963). In the case at bar the trial judge correctly found that plaintiff established such an element by showing that both he and defendant operated under a mutual mistake of fact as to the contents of plaintiff's contract to sell Summertime Cafe, Inc. Both parties believed that it provided for a sale of assets (in which case plaintiff would have been liable for the cabaret tax) when in fact it provided for a sale of stock (and plaintiff was not liable for the tax). Therefore, plaintiff was not a volunteer and is able to bring the present action.

Plaintiff had standing as a taxpayer. He was not a volunteer. Accordingly, all plaintiff needed to show in the instant case was that a tax was wrongfully collected from him, a proper refund claim was submitted which was denied by the Internal Revenue Service and a timely action was brought in the present suit. From the record it is apparent that plaintiff has met such prerequisites. I would, therefore, hold for plaintiff.

Findings of Fact

FINDINGS OF FACT

1. The plaintiff, Francis Collins, currently resides at 14 Summit Avenue, Chelsea, Massachusetts. Until 1973, Mr. Collins resided at 54 Eliot Road, Revere, Massachusetts.

2. In December of 1963, Mr. Collins purchased Summertime Cafe, Inc., a Massachusetts corporation. In connection with the purchase, Mr. Collins retained a Boston attorney.

3. The principal asset of Summertime Cafe, Inc., which operated the Candy Lounge, was a seasonal liquor license. The Candy Lounge, which was operated from April 1 to November 30 during each of the years in issue, was a nightclub which offered alcoholic beverages for purchase and provided band entertainment.

4. By an agreement dated August 3, 1965, Mr. Collins sold the stock of Summertime Cafe, Inc., to Mr. Harold Loew for $14,000 in cash plus an amount equal to the wholesale price of the liquor inventory at the time of closing, all deposits with public utilities, and cash on hand, subject to the adjustments for taxes described in finding 19, *infra*.

5. Subsequent to sale of Summertime Cafe, Inc., Mr. Collins' only contact with the corporation or the purchaser of the corporation was as an occasional patron of the nightclub.

6. In the spring of 1968, Mr. Collins was contacted by Revenue Agent D. E. Harrington, who was conducting an audit of Summertime Cafe, Inc.'s federal income tax returns for the years 1964 and 1965. In connection with this audit, Mr. Harrington had five conferences with Mr. Collins at his home.

7. The main item under investigation by Mr. Harrington was the band expense deduction claimed by Summertime Cafe, Inc., on its 1964 and 1965 federal income tax returns. Although Mr. Collins had turned the books of the corporation over to the purchasers in 1965, he had retained the individual bills and receipts for each band payment and made them available to Mr. Harrington for use in his audit.

8. After a review of the band receipts, which were largely handwritten by Mr. Collins and signed by the individual band leaders, Mr. Harrington told Mr. Collins that the claimed deductions for band expenses were doubtful and

that, if band entertainment had been provided, a cabaret tax would then be due.

9. The cabaret tax referred to by Mr. Harrington was an excise tax in force during 1964 and 1965. The tax was based on gross receipts during the period in which band entertainment was provided. If the band expenses were allowed, the corresponding cabaret tax would automatically arise.

10. During the course of the audit of Summertime Cafe, Inc.'s, 1964 and 1965 federal income tax returns, Mr. Harrington requested from Mr. Collins retained copies of his personal federal income tax returns.

11. As the result of Mr. Harrington's audit, deficiencies in federal income taxes for the years 1964 and 1965 were proposed against both Summertime Cafe, Inc., and Mr. Collins in audit reports mailed under cover letters dated May 22, 1969. The audit report for Summertime Cafe, Inc., was mailed to the corporation in care of Francis Collins. The proposed deficiency was mainly based on the disallowance of band expense deductions claimed for the years 1964 and 1965 and the proposal of a 5 percent negligence penalty.

The deficiency proposed against Mr. Collins resulted from the inclusion in his income of the amounts disallowed as band expense deductions to the corporation, on the ground that Mr. Collins, as the sole shareholder of the corporation, received a constructive dividend in those amounts. In addition, for the year 1964, Mr. Collins was determined to have additional tip income in the amount of $135.

12. After the issuance of a revenue agent's report and a letter from the Internal Revenue Service containing an explanation of appeal rights, a district conference may be requested. If, and only if, a conference is requested, the case is assigned to a district conferee. If agreement is not reached at the district conference level, an appellate conference may be requested or a notice of deficiency may be issued to allow the filing of a petition in the United States Tax Court.

13. As the result of a request by Mr. Collins, four district conferences were held between Mr. Collins and John MacDonald, District Conferee, Internal Revenue Service, who

had been assigned to the cases of Summertime Cafe, Inc., and Francis Collins in June 1969.

14. In preparation for his conferences with Mr. Collins, Mr. MacDonald received the case file and conducted legal research in the area of substantiation of band expenses.

15. During the first conference, which took place in July of 1969, Mr. MacDonald raised the question of whether Mr. Collins had sold the stock or the assets of Summertime Cafe, Inc., in 1965 and explained that if the assets had been sold, Mr. Collins might be liable for the corporate taxes. However, as Mr. MacDonald explained, if the stock of the corporation had been sold, the continuing corporation rather than Mr. Collins would be liable for the tax deficiencies, although the purchasers might look to Mr. Collins for reimbursement if the sale contract contained a warranty clause. After making this explanation, Mr. MacDonald requested a copy of the sale contract from Mr. Collins so that a determination as to the nature of the sale could be made.

Mr. Collins appeared to Mr. MacDonald to understand the explanation given and neither asked questions nor requested any further explanations. Since Mr. Collins appeared to understand the explanation, Mr. MacDonald felt that it was unnecessary to repeat the request.

16. In response to Mr. MacDonald's explanation and request for a copy of the sale contract, Mr. Collins became visibly agitated and stated that he didn't want to discuss the sale and that he would pay the taxes. Thereafter, Mr. MacDonald considered Mr. Collins to be, and treated him as, a volunteer.

17. During the discussion of the question of Mr. Collins' personal liability, Mr. MacDonald did not state that Mr. Collins was liable for the corporation's taxes as a transferee or in any other capacity.

18. Although Mr. Collins could have obtained a copy of the sale contract at any time, he never produced the document in response to Mr. MacDonald's request and never tried to give a copy of the document to Mr. Harrington.

19. The sale was in fact a sale of stock and the contract does in fact contain a warranty clause stating that all taxes of the corporation other than then-current taxes would be

paid in full and that all required income reports would be filed by the time of purchase. Further, taxes for the current year (1965) were to be prorated between the buyer and seller and a corresponding adjustment made to the sale price of the corporation. Later arising tax liabilities were to be handled as follows:

> if, at any time, subsequent to the consummation of this purchase and sale, it shall be finally determined by the taxing authorities that the aforementioned adjustment of taxes was incorrect, then a readjustment between the SELLER and the BUYER shall be made.

Section 9 of the contract, which is ambiguously and ungrammatically worded, purports to limit the seller's warranty to a period of 90 days following the consummation of the contract, and creates a question as to whether that period would apply to taxes for the current year. However, that uncertainty is not relevant to the present issue of plaintiff's tax liability vis-à-vis the defendant, but relates only to plaintiff's liability to reimburse the corporation for any taxes it would be required to pay.

20. In cases involving transferee liability (the liability of a transferee of assets for taxes owed by the transferor en tity), the transferor's tax liabilities are assessed against the transferee. In processing a transferee case, special forms and reports are required to be prepared and submitted by the revenue agent handling the case. Mr. MacDonald was familiar with the procedures required in transferee cases and followed these procedures on an average of three times per year in various cases assigned to him. It was his practice to follow these procedures in all cases involving transferee liability whether or not liability as a transferee is contested. In the processing of this case, none of the special procedures were followed and no transferee reports or transferee statements were prepared by Mr. MacDonald.

21. As the result of legal research conducted prior to these conferences, Mr. MacDonald had concluded that the band expense deductions claimed by Summertime Cafe, Inc., would be allowable if certain infomation were provided by Mr. Collins. Mr. MacDonald requested from Mr. Collins the receipts signed by the various band leaders and other specific information relating to the provision of live enter-

tainment. On the basis of the receipts and other information provided by Mr. Collins, Mr. MacDonald concluded that the band expenses were allowable as deductions. Mr. MacDonald also concluded that with respect to the separate case of Mr. Collins individually, the only adjustment would be the additional tip income resulting in a deficiency of under $30.

22. As Mr. MacDonald had explained to Mr. Collins at their first conference, if the band expenses were allowable as deductions, excise (cabaret) taxes would automatically become due. At the last conference with Mr. Collins, Mr. MacDonald computed the cabaret taxes due from the corporation and discussed the imposition of a penalty for failure to file the required cabaret tax returns. Subsequently, cabaret tax returns were prepared by Mr. MacDonald and sent to Mr. Collins.

23. When dealing with individuals who are not represented by counsel, it was Mr. MacDonald's practice to provide to the individual certain assistance which would normally be provided by counsel. In this case, for example, Mr. MacDonald explained to Mr. Collins the tax consequences of the various types of sale, offered to examine the sale document to make a determination as to Mr. Collins' liability, and suggested the type of evidence necessary to substantiate the corporate expenses in issue.

24. Mr. Collins testified that he would not have continued with the conferences with Mr. MacDonald if he had been unwilling to pay the taxes and that he did not indicate to Mr. MacDonald in any way that he was unwilling to pay the taxes under consideration. After his last conference with Mr. Harrington, Mr. Collins believed that the final figure might be as low as $1,000 and he "figured it's easier to pay than to fight it."

25. At this point, Mr. Collins retained Peter Sang as counsel to represent him with respect to the tax adjustments in issue. From that point on, further discussions with Mr. MacDonald concerning substantive matters with respect to Mr. Collins' personal taxes and the corporate tax matters were handled solely by Mr. Sang.

26. Approximately a week after their last conference, Mr. Collins telephoned Mr. MacDonald to inform him that he

(Mr. Collins) had retained counsel. Mr. MacDonald requested and received from Collins a signed power of attorney form, dated August 26, 1969.

27. After the power of attorney form had been submitted, Mr. MacDonald and Mr. Sang discussed the proposed imposition of a penalty for late filing of the cabaret tax returns. As the result of this discussion, an affidavit signed by Mr. Collins and Mr. Sang was received by Mr. MacDonald. The affidavit contained Mr. Collins' explanation of the failure to file the required carabet tax returns and concluded with the following paragraph:

> Collins now knows and he admits that cabaret taxes were due for 1964 and 1965 and must now be paid. Based upon the circumstances surrounding his entrance into the nightclub business and his record of having filed all necessary employment forms, it is felt that there should be no imposition of any penalty for late filing. Upon learning of the fact that cabaret taxes are due, Collins has been willing to pay these taxes plus interest.

Based on the contents of this affidavit, Mr. MacDonald recommended that the penalties not be imposed.

28. Subsequent to receipt of the affidavit, on or about September 12, 1969, Mr. Collins submitted the executed cabaret tax returns and paid the following proposed tax liabilities of Summertime Cafe, Inc.:

Cabaret Tax		
Quarters ending:		
June 30, 1964	$700.00	
Sept. 30, 1964	700.00	
Dec. 31, 1964	469.00	
		$1,869.00
June 30, 1965	907.00	
Sept. 30, 1965	605.00	
		1,512.00
Income Tax		
1965 (tax and penalties)	367.85	
		367.85
		$3,748.85

29. Mr. MacDonald did not discuss this case with Mr. Harrington, the original revenue agent, at any time. Mr. Harrington died in the summer of 1973, about the time that the plaintiff filed the petition in this case.

Syllabus

30. On March 27, 1971, Mr. Collins filed claims for refund of the corporate taxes listed in finding 28, supra. Statutory notices of the disallowance of these claims were issued on February 3, 1973.

ULTIMATE FINDING OF FACT

Based on all the relevant evidence presented in this case, Mr. Collins' payment of the proposed tax deficiencies of Summertime Cafe, Inc., was voluntary and was not induced by duress exerted by agents of the Internal Revenue Service.

CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that judgment is entered for the defendant and plaintiff's petition is dismissed.

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533 F. 2d 531

THE UNITED STATES v. THE FORT SILL APACHE TRIBE OF THE STATE OF OKLAHOMA

Appeal No. 19-74

Ind. Cl. Comm. Docket Nos. 182 and 182-A

[Decided April 14, 1976]

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

Indian claims; appeal from Indian Claims Commission; "trespass damages" for pre-taking date removal of minerals.—This is another phase of the litigation begun in August 1951 relating to claims for the taking by conquest of the claimant Tribe's lands, and for removal of resources from the land prior to the date of title extinguishment. The Indian Claims Commission severed these claims and subsequently determined as to the taking claim that the taking date was September 4, 1886, and made an award for the land which had also benefited from certain value-enhancing activities of the United States. On appeal this court held that the severance of the claims was within the Commission's discretion and that the choice of date, though erroneous, could not be departed from because of the Government's conduct of the litigation (202 Ct. Cl. 134, 480 F. 2d 819 (1973)). The severance issue again came before the court on unsuccessful appeals by the United States (202 Ct. Cl. 525, 481 F. 2d 1294 (1973), and 205 Ct. Cl. 805, 507 F. 2d 861 (1974)). In the deci-

Syllabus

sion presently under appeal, the Commission found that before 1876 there was no appreciable removal of minerals, and held that the United States is liable in the amount of $10,830,860.40 under the fair and honorable dealings clause of the Indian Claims Commission Act for the minerals extracted by non-Indian miners during the period from 1876 to the date of title extinguishment. The figure represents a 20% royalty on the estimated gross value of ore produced on the land before September 4, 1886. It is *held* that the United States is not liable for the pre-September 4, 1886 depredations of the miners on the basis of failure to protect, because it had no duty to keep them out. It is liable only if the miners' acts can be imputed to the United States and are deemed in contemplation of law to be the acts of the United States. In making an award on that theory, the Commission must consider all acts imputable to the United States. It cannot consider only the acts that detracted from value and ignore those that added to value. Reversed and remanded for further proceedings not inconsistent with the opinion.

Indian claims; Indian Claims Commission; fair and honorable dealings.

[1] A duty to protect Indians against depredations by third persons may arise by treaty or statute, the breach of which duty displays a want of fair and honorable dealings under Sec. 2, Cl. 5, of the Indian Claims Commission Act. Such a duty can hardly be said to arise with respect to a hostile or enemy Tribe, one with which no treaty exists, because there is then not the "special relationship" or "special duty to protect" that may, if unfulfilled, display a want of fair and honorable dealings.

United States ⟸ 106(1)

Indian claims; Indian Claims Commission; awards; pre-taking date compensation; trespass damages.

[2] Where the Indian Claims Commission severed the claim for taking by conquest of the claimant Tribe's land and the claim for "trespass damages" for minerals removed before the date of title extinguishment by non-Indian miners whose deeds may be imputable to the United States, and the Commission determined that the taking date was September 4, 1886 and made as of that date an award for the land enhanced in value because of previous activities imputable to the United States and diminished because of the estimated quantity of minerals previously removed, based on the history and facts of this case and assuming the propriety of a supplemental award under the fair and honorable dealings clause of the Indian Claims Commission Act for said "trespass damages," the most that fair and honorable dealings could require would be that the supplemental award should add to the total compensation any net reduction in the compensable 1886 value caused by activities of the United States or imputable to the United States, after expulsion of the Apaches and up to the taking date.

United States ⟸ 113

Dean K. Dunsmore, with whom was *Assistant Attorney General Peter R. Taft*, for appellant.

I. S. Weissbrodt, attorney of record for appellee. *Richmond F. Allan*, *Abe W. Weissbrodt*, *Ruth W. Duhl*, *Howard Sribnick*, and *Weissbrodt & Weissbrodt*, of counsel.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, DAVIS, SKELTON, NICHOLS, KUNZIG, and BENNETT, *Judges*, *en banc*.

NICHOLS, *Judge*, delivered the opinion of the court:

This appeal is against an award for "trespass damages" and is another phase of a litigation almost as full of dramatic contest, confrontation, and strange turns of fate, as is the history of the claimant tribe or band in the period to which its claims relate, the nineteenth century. From the filing of the petition, August 1, 1951, there were pending simultaneous claims under the Indian Claims Commission Act, 25 U.S.C. Sec. 70 and ff., for the taking by conquest of a vast area to which it claimed aboriginal title, and for removal of resources from the same area before the date of title extinguishment. The Commission severed these claims. As to the former, it determined that the taking date was September 4, 1886. The Commission awarded $15,975,000 for the land as it was on that date, better or worse because of the defendant's previous activity. The land consisted of 14,802,387 acres in New Mexico and Arizona. On the valuation date the land benefited from good rail transportation and telegraph lines. The white population was 26,000 and value was enhanced by several townsites. The railroads had brought the tract into prominence as a livestock producing area, and it was producing minerals.

The defendant had at first acquiesced in the severance, and in the 1886 taking date, but at some point came to realize that the severance, together with the late taking date, brought forward the possibility that besides a value enhanced by the white man's occupancy and use of the tract, it might also be called on to pay "trespass damages" for mineral extraction and timber cutting, etc., before the taking date. In its appeal before us, No. 3–72, defendant sought to undo both the severance of the two types of claims and the taking

date of September 4, 1886. We held that the former, the severance, was within the Commission's discretion, and the choice of date, though patently erroneous, could not be departed from because of defendant's conduct in the litigation down to a then recent date. If we were to rule on the merits, we said, we would hold the taking date or title extinguishment would be not later than the Act of August 15, 1876, 19 Stat. 176, 195, which directed that the Indians be confined to and not allowed to leave their proper reservations, which were remote from the tract in issue. *United States* v. *Fort Sill Apache Tribe*, 202 Ct. Cl. 134, 480 F. 2d 819 (1973).

The severance issue came before us again in two separate and unsuccessful appeals, 202 Ct. Cl. 525, 481 F. 2d 1294 (1973), and 205 Ct. Cl. 805, 507 F. 2d 861 (1974), as the Government continued to try to thrash itself out of the trap it had helped to dig for itself and into which it had fallen.

As the Commission, in the decision here appealed from, has now found, before 1876 no appreciable removal of minerals had occurred. It commenced with the discovery of the Tombstone silver mining district in 1877. With use of 1876 for valuation purposes, it would have been possible to determine a single uncomplicated award for the Indians with no possible unfairness to either side.

The Commission has now awarded $10,830,860.40 damages under Sec. 2, Cl. 5 of the above Act, in addition to the almost 16 million previously awarded, this time for minerals extracted by miners after 1876 but before the taking date as found: the so-called "trespass damages." The figure represents a 20% royalty on the estimated gross value of ore produced on the land before September 4, 1886. The Government appeals and we reverse.

Facts found in the previous case are repeated in this: The population of the tract by non-Indians by 1886 was 26,000. There were numerous settlements. The main line of the Southern Pacific crossed it and there were several branch lines of the Atcheson, Topeka and Santa Fe within it. The railroads brought the tract into prominence for livestock production. The United States encouraged development by laws, *e.g.*, Act of March 3, 1871, 16 Stat. 573, and May 10, 1872, 17 Stat. 91. It also conducted military campaigns against

the Chiricahua Apaches, and tried to confine them to statutory reservations distant from the tract here involved. The Commission says it assumed responsibility for the intrusions and exploitation, dealing unfairly and dishonorably in violation of Sec. 2, Cl. 5.

In its appeal the appellant, United States, urges error in that appellees, the Indians, have estopped themselves to urge that they did not have exclusive use and occupancy up to the found taking date of September 4, 1886, and it phrases its argument in several different ways, making, however, essentially the same point. In plain terms, it is saying the Indians got the benefit of an illegitimately delayed taking date and ought to accept the burdens too. We think that the real issue is whether the Indians have a moral claim under Clauses 4 and 5 that remains unsatisfied by the award already made for the taking found to have occurred on September 4, 1886, and if so, whether the Commission has gone about satisfying it in the correct manner.

The Commission has found, 19 Ind. Cl. Comm. 212, 238, affirmed by this court, *Fort Sill Apache Tribe* v. *United States*, 201 Ct. Cl. 630, 477 F. 2d 1360 (1973), *cert. denied*, 416 U.S. 993 (1974), that the treaty of July 1, 1852, 10 Stat. 979, was dead, having been violated by both sides, and no one was in a position to assert rights thereunder. In the case above cited, we concluded that there existed no special relationship with the Tribe, from which a duty to protect might be inferred. As a matter of fact, the records in the various Chiricahua Apache cases are replete with evidence that that Tribe and the United States were at war throughout the period when the alleged "trespass damages" were inflicted, though the above treaty had been intended as one to establish peace. In *Scott* v. *United States*, 33 Ct. Cl. 486 (1898), this court held that the relationship then obtaining was war. While the Commission selected the September 4, 1886, date as it was the end of organized Apache resistance, the surrender by Geronimo and his band, deep in Mexico, the claimant Tribe, all sexes and ages alike, were held as prisoners of war for some time thereafter. 1 Ind. Cl. Comm. 137, 139 (1949).

A duty to protect Indians against depredations by third persons may arise by treaty or statute, the breach of which

duty displays a want of fair and honorable dealings under Clause 5. *Lipan Apache Tribe* v. *United States*, 180 Ct. Cl. 487 (1967); *United States* v. *Sioux Nation*, 207 Ct. Cl. 234, 518 F. 2d 1298, *cert. denied* 423 U.S. 1016 (1975); *United States* v. *Goshute Tribe*, 206 Ct. Cl. 401, 512 F. 2d 1398 (1975); *Aleut Community* v. *United States*, 202 Ct. Cl. 182, 480 F. 2d 831 (1973). Such a duty can hardly be said to arise with respect to a hostile or enemy Tribe, one with which no treaty exists. There is then not the "special relationship" or "special duty to protect" that we have considered may, if unfulfilled, display a want of fair and honorable dealings. *Lipan Apache Tribe* v. *United States*, *supra*. We think it follows that the United States is not liable for the pre-September 4, 1886 depredations of the miners because it had any duty, as it did in *United States* v. *Sioux Nation*, *supra*, to keep them out. It is liable only if the miners' acts can be imputed to the United States and are deemed in contemplation of law to be the acts of the United States.

We indicated in *United States* v. *Northern Paiute Nation*, 183 Ct. Cl. 321, 393 F. 2d 786 (1968), and on the "trespass damages" phase, 203 Ct. Cl. 468, 490 F. 2d 954 (1974), that we considered that the ravages of miners could be imputed to the United States and would make the United States a taker when (a) the United States military forces excluded the Indians from the mining areas and protected the miners in their possession, and (b) the United States mining laws recognized or retroactively validated titles obtained by staking claims, even though on lands whose aboriginal Indian titles had not been previously extinguished. This theory would, it would seem, require the thing taken to be at least as extensive as the staked claim. This is not the Commission's theory. By that, minerals within the claim but still in the ground remained the property of the Indians until September 4, 1886, and the United States is mulcted now only for what the miners actually removed, before that date. The Commission has further scotched the imputed taking idea by saying that its September 4, 1886 taking date here is not an average or composite date. Everything was taken then, contrary to *Northern Paiute*, where we concluded that the taking date was an average or composite, not necessarily the

actual taking date for every part of the tract. The difficulty therefore shapes up to be that in the earlier *Apache* decision, as construed by the Commission in this case, the Commission of necessity found that acts constituting the United States a taker did not occur before September 4, 1886, while to sustain the imputed taking theory here, it would be necessary now to find that such acts did occur. The Commission in the earlier decision in effect found that United States troops did not drive the Apaches off the tract involved, and keep them off, on or before 1876, that miners did not thereafter enter and stake claims under authority of United States mining laws, and that Congress did not establish a reservation for the Apaches at a distant place, which they were not to be allowed to leave. We know that in history, these things occurred, but for purposes of the prior decision, they did not. The Commission will be seen, if one reads its findings herein with care, to have framed them in such a way as not to find expressly now a taking imputable to the United States. It simply says (finding 5):

> Before the Chiricahua Apaches aboriginal lands were taken by the United States on September 4, 1886, the policy of the United States was to encourage the *intrusion* upon and exploitation of the said lands by non-Indian third parties. The United States encouraged the exploitation of these lands by enacting laws aimed at developing the said lands * * * (Emphasis supplied).

It refers also to the military campaigns and the attempt, it calls unsuccessful to confine Chiricahua Apaches to reservations. But the word "taking" is carefully avoided, as it has to be to avoid overt contradiction of the former decision. It seems to be holding the United States liable for aiding and abetting tortious acts.

We thus see the Commission to have fallen between two stools. It cannot base its holding on a dishonorable failure to observe a non-existent undertaking to protect. It will not, and now cannot abandon its previous theory that the only taking imputable to the United States occurred on September 4, 1886. So it attempts to hold the United States liable for sanction and encouragement to the miners, not amounting to a taking, that makes so-called "trespass damages" imputable to the United States.

The record plainly shows that the United States or persons whose acts were imputable to the United States, entered the land long before the chosen taking date of 1886, and dealt with it as their own. The award for the taking on the chosen date, plainly of record was enhanced because of their value-enhancing activities such as railroad building, town building, and cattle raising. It also shows that large quantities of minerals were extracted. In fixing the 1886 value, the award was diminished because of the estimated quantity of minerals previously removed. In these circumstances, the most that fair and honorable dealings could be held to require now would be that the supplemental award here under consideration should add to the total compensation any net reduction in the compensable 1886 value caused by activities of the United States, or imputable to the United States, after expulsion of the Apaches and up to the taking date. The "trespass damages" award here under consideration blatantly fails to do this. It singles out a single activity, the mining, that the Commission considered deleterious, and makes an award for that, without any offset, leaving the Apaches to enjoy the full benefit in their primary award, without deduction, for activities that enhanced the value.

The reasons for imputing the miner's activities to the United States, whether good or bad, at any rate apply equally to the beneficent activities that enhanced the 1886 value. They too would not have been possible had not the military driven the Apaches away. They too were encouraged by the laws and policy of the Government. A mere tortious trespasser might perhaps be liable for his ravages and yet forfeit his improvements. The United States, with its sovereign rights and rights as proprietor of the soil, was not a mere trespasser. The Commission itself indeed implicitly recognizes this when it considers and rejects the Indians' claims for "trespass" to the non-mineral parts of the tract, on the ground they did not impair the total value.

In *United States* v. *Northern Paiute Nation*, *supra*, we said at 203 Ct. Cl. 475, 490, F. 2d at 958:

> * * * The parties were given somewhat of a washout in that in Docket 87 defendant got no credit for improvements its imputed agents, the miners, constructed, and was not asked to account for their ravages. The

> Commission, in Docket 87–A, would now go back on this where the ravages are concerned, without giving defendant the benefit of its improvements.

We continue to believe that fair and honorable dealings do not require adjustments to value on the taking date, of this inequitable and one-sided character.

That the removal of so many tons of ore occurred, tells us only one of many things we need to know, to make a fair and honorable adjustment for any change in value occurring between 1876 and 1886, and imputable to the United States. The record does not tell us the rest. We shudder to contemplate any further fact finding at this late date. We only say that the Commission's method of assessing pre-1886 "trespass damages" cannot be sustained.

The parties to Indian Claims litigation, we are told, have been awaiting a sweeping pronouncement by us as to "trespass damages." We regret this is not the case for it. It goes on its history and peculiar facts, as other cases have done. It would be unwarranted dictum to pronounce on cases not before us. We suspect, however, that other "trespass damage" cases will also go on their peculiar facts and that we will never have one suited to establish a grand and general precedent. We think the problem, at least as presented in the cases that have come before us, arises because dates for taking are selected that are unreasonably late. No doubt in many cases, as here, a proper taking date would eliminate the problem and permit a unitary taking award that would be fair and just. When the taking date is and for any reason has to be long after the United States or persons for whose acts the United States is responsible have been in possession and have made improvements, we think the damages should reflect no more than any net reduction the total of their activities have effected in the compensable value. Even with the fairest intentions, any other technique lends itself to juggling and to making the sum of the parts exceed the unitary whole.

The dissent urges that the law of the case and collateral estoppel prevent us from considering directly or indirectly, that September 4, 1886 was too late a date or that the Government could not be held liable for enhancement in value due to its acts before September 4, 1886, contrary to the

decision in Appeal No. 3–72. Anticipating this argument, we took the majority opinion in that case exactly at its word. It did not undertake to commit the court to the correctness in all respects of the decision below, and instead intimated strongly it was in error. It simply held the error was not reversible for reasons given.

If, however, (as no one urges) *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339 (1941), or any other authority, were deemed to require use of September 4, 1886, we would still be of the opinion that the assessment of "trespass damages", as done by the Commission in this case, was erroneous. We would still think that any damages for activities of the taker, or persons whose deeds are imputed to the taker, before the taking date, awarded to supplement the principal award for taking date value, and as an addition thereto, should reflect only the net unfavorable impact if any, upon value, of all activities imputable to the taker. It should not mulct the United States for the sour and ignore the sweet. The scope and variety of the taker's pre-taking acts here are what make the point so important and the Commission's error so highly prejudicial. *United States* v. *Goshute Tribe*, *supra*, is not inconsistent because it went off on the unfair and dishonorable nature of the treaty, which licensed the miners to remove minerals before the taking date. In part VI of that opinion we compared the case with *United States* v. *Northern Paiute Nation*, *supra*, and pointed out the differences that justified a different result. We indicated skepticism as to the theoretical perfection of the method used, but under the circumstances, including the role of the defendant in the litigation, we did not see prejudicial error such as would justify reversal. We think we sufficiently saved our rights to do what we think is needful here, and do not read the dissent as arguing otherwise.

In *Gila River Pima-Maricopa Indian Community* v. *United States*, 204 Ct. Cl. 137, 494 F. 2d 1386, *cert. denied*, 419 U.S. 1021 (1974), it is held that in some circumstances the selection of a taking date is a discretionary function. If an earlier date within the permissible zone of discretion would permit a unitary award, while a later one would involve activities of the taker on the land before the chosen

date, with complications such as we have here, it would appear the earlier date would be easy to justify and the later one difficult, perhaps to the point of being abuse of discretion.

Reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed and Remanded

DAVIS, *Judge*, dissenting:

This decision means that the United States, having lost the crucial battle, nevertheless wins the war. As the court points out, the Government was well aware for a very long time that these Indians were claiming both the value of the land as of the extinguishment of Indian title (which they said occurred in 1886) and also "trespass damages" for minerals removed before that date. Despite this clear knowledge, "in the proceedings below [before the Indian Claims Commission] at no time did defendant-appellant [the Government] properly propose its alternative theories of the date of taking when the issue was pending before the Commission and seek to convince the Commission that the weight of the evidence in the record supported one or another of such theories. Likewise, at no time did defendant-appellant actively and properly oppose the taking date proposed by petitioners and found by the Commission." *United States* v. *Fort Sill Apache Tribe*, 202 Ct. Cl. 134, 143–44, 480 F. 2d 819, 824 (1973). "As it was, the entire valuation trial centered on the 1886 date which the Government first disputed after the completion of that trial." 202 Ct. Cl. at 145, 480 F. 2d at 825.[1]

I had thought that the gist of our 1973 decision was that, in those circumstances, the Government could not go behind the 1886 date which had to be accepted for all purposes as the proper date for the extinguishment of Indian title. We did observe that the record could be said to establish that Indian title was in fact cut off in 1876, but we brushed that conclu-

[1] The court pointed out that the Indians might well have introduced other or additional evidence if they had been alerted that the Government was challenging the 1886 date. Likewise, the Commission might have decided differently if it had been made aware that the 1886 date was in contest. 202 Ct. Cl. at 145, 480 F. 2d at 825.

sion aside because the Government's conduct of the litigation amounted to a waiver of the right to challenge the 1886 taking date. 202 Ct. Cl. at 141–42, 480 F. 2d at 823.

It follows, I think, that we are prevented by the law of the case and the doctrine of collateral estoppel from considering, directly or indirectly, that 1886 was too late a date or that value as of that time embodies enhancements for which the Government should not be held liable to these Indians. We have to act on the present appeal as if on the record of these cases 1886 was the truly correct date for the extinction of aboriginal title. On that basis I would affirm the Commission in granting "trespass damages."

Since the court does not deal at length with the pristine case of "trespass damages"—which is how I believe we must look at the instant appeal—I merely sketch my position that they are awardable. The Government centers its disagreement on the proposition that any proof of extraction of minerals, under the auspices of the United States, prior to the "taking" date would necessarily demonstrate the extinction of Indian title before that time and accordingly would conflict pro tanto with the "taking" date. The flaw I find in that argument is that it neglects the controlling standard that aboriginal title is not cut off until Congress (or the executive as its authorized delegate) decides, expressly or implicitly, that Indian title should be ended. Intrusions onto Indian land, even authorized intrusions, do not have that effect unless Congress also intended them to end, or treated them as ending, the aboriginal ownership. That intention is the ultimate touchstone, not the physical or historical facts of governmental intrusions or incursions unconnected with a purpose, implied or specific, to close out Indian title at that particular time. *See United States* v. *Santa Fe Pac. R. R.*, 314 U.S. 339 (1941); *Tlingit & Haida Indians* v. *United States*, 147 Ct. Cl. 315, 177 F. Supp. 452 (1959), *decision on valuation after remand*, 182 Ct. Cl. 130, 389 F. 2d 778 (1968); *Edwardsen* v. *Morton*, 369 F. Supp. 1359 (D.D.C. 1973). It would be quite possible, for instance, for Congress first to allow entries under the mining laws and then, some years later, to enact a statute terminating as of that time the Indians' aboriginal ownership of the same lands. In such a situation the value of the minerals removed before the final

"taking" date would be recoverable by the Indians as "trespass damages." *Cf. United States* v. *Goshute Tribe*, 206 Ct. Cl. 401, 512 F. 2d 1398 (1975).

In that type of case—where mineral or other natural property is removed from aboriginal land (prior to Indian-title extinction) by, or under the direct auspices of, the United States— the claiming Indians need not prove any "special relationship" with the United States to recover under the fair-and-honorable dealings clause. The injurious act is that of the United States itself, and it is less than fair and honorable for the Government to remove minerals (without proper compensation) from land which is still possessed by the Indians (whether by recognized or by aboriginal title).

In this case, we are required, as I have suggested, by our 1973 decision to treat 1886 as if Congress had at that time passed a joint resolution ending the Indians' title although there had already been substantial intrusions for a decade before that time. The value of the minerals removed as a result of those intrusions constitute the "trespass damages" awarded by the Commission.[2] That tribunal had substantial evidence to support its figure and the royalty method it used is acceptable. There is no reason to believe that the value of the minerals was counted twice. *See United States* v. *Goshute Tribe*, *supra*, 206 Ct. Cl. at 406–07, 412, 512 F. 2d at 1400, 1403.

COWEN, *Chief Judge*, concurring in part in the dissent of *Judge* DAVIS:

I concur in that portion of Judge Davis' dissent in which he would hold that, as a result of our 1973 decision in this case, we are prevented by the law of the case and the doctrine of collateral estoppel from considering, directly or indirectly, that the Indian land as of 1886 embodies enhancements for

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[2] In the *Goshute Tribe*, *supra*, 206 Ct. Cl. at 409–10, 512 F. 2d at 1402, the court recognized both a general "taking" date (1875) and also the value of the minerals previously extracted. There was in that case a treaty permitting exploration of the Indian lands for minerals. Because I believe the existence of such a treaty to be unnecessary, I would apply the same rule as in *Goshute* to situations where there is no treaty but where there is extraction of minerals by the United States or under the Government's sponsorship, prior to a general "taking" of the aboriginal land.

which the Government shall not be held liable to the Indians. I agree that the court must decide the present appeal on the basis that 1886 was the correct date for the extinction of aboriginal title.

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534 F. 2d 889

HUGHES AIRCRAFT COMPANY v. THE UNITED STATES

[No. 426–73. Decided April 14, 1976]

ON DEFENDANT'S MOTION FOR PARTIAL DISMISSAL

Patents; infringement; Foreign Military Sales Act; joint United States and United Kingdom defense satellite communications program; Court of Claims jurisdiction.—Plaintiff seeks compensation for alleged infringement of its U.S. patent No. 3,758,051 in connection with the Government's participation with the United Kingdom in a joint defense satellite communications program (Skynet II), undertaken pursuant to a 1970 Memorandum of Understanding, and implemented through procedures of the Foreign Military Sales Act. The case presents four questions concerning the court's patent and general jurisdiction: (1) whether the use or manufacture of the patented invention, purportedly on behalf of the United Kingdom, constituted a use or manufacture "by or for the United States" sufficient to vest jurisdiction in this court under 28 U.S.C. § 1498(a); (2) whether plaintiff's claim "grows out of" or is "dependent upon" the 1970 Memorandum of Understanding so as to preclude this court's jurisdiction by virtue of 28 U.S.C. § 1502 (treaty preclusion); (3) whether the Skynet II program, insofar as United States expenses thereunder were to be fully reimbursed by the United Kingdom, was a nonappropriated fund activity as to which this court lacks jurisdiction by virtue of 28 U.S.C. § 2517; and (4) whether the omission from the 1968 Foreign Military Sales Act of the special patent infringement jurisdictional provision contained in predecessor statutes manifests congressional intent to eliminate this court's jurisdiction over claims arising from the Government's foreign military sales activities. For the reasons discussed at length in the opinion, it is *held* that this court's jurisdiction is not barred in any of the four categories enumerated above. Defendant's motion for partial dismissal (treated as a motion for partial summary judgment) is denied, and the case is remanded to the Trial Division for disposition of the remaining issues of fact and law in accordance with the opinion.

Court of Claims jurisdiction; patents; patent infringement.

[1] 28 U.S.C. § 1498(a) vests exclusive jurisdiction in the Court of Claims over patent infringement claims against the Government arising from unlicensed use or manufacture of a patented invention by the United States directly, and/or unlicensed use or manu-

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facture of a patented invention for the United States and with its authorization or consent. A finding of jurisdiction is conditioned upon a showing that the accused use or manufacture was undertaken for the Government, i.e. for the Government's benefit, and that the Government gave its authorization or consent for the accused use or manufacture.

Courts ⇐ 449(3), 518(3)

Court of Claims jurisdiction; patents; use by or for the Government.

[2] The record shows that the defense satellite communications program (Skynet II) of the United States and the United Kingdom was intended by both participants to be a cooperative program vital to the military defense and security of both countries. Moreover, the 1968 Foreign Military Sales Act, and predecessor acts, not only indicate that the Governor's foreign military sales and assistance activities have consistently been undertaken for the direct benefit of the United States, but have also consistently included a special provision vesting jurisdiction in this court or the appropriate district court of any patent infringement claims arising in connection therewith. The court therefore concludes that the Skynet II program was undertaken *for the United States* within the meaning of 28 U.S.C. § 1498(a).

Courts ⇐ 449(3)

Court of Claims jurisdiction; patents; Government authorization or consent to infringement.

[3] The authorization and consent for any infringement which might occur under the joint Skynet II program as given by the U.S. Department of Defense in this case constitutes a clear functional equivalent of the standard blanket authorization and consent clause utilized in regular defense contracts pursuant to Part 9 of the Armed Services Procurement Regulations (ASPR). To fall within the ambit of both the ASPR clause and the above-mentioned Defense Department authorization, the accused manufacture need only have occurred in the performance of the particular contract. The stated purpose of the Defense Department Skynet II authorization and the purpose for inserting such clauses in defense contracts generally comport with the broad purpose and policy of Sec. 1498(a) to cloak with immunity from injunction certain types of activity deemed vital to United States interests or objectives. There is no requirement that authorization or consent necessarily appear on the face of a particular contract; Government authorization or consent may be given in many ways other than by letter or other direct form of communication.

Courts ⇐ 449(3)

United States ⇐ 97

Attorney General; bringing and prosecution of actions.

[4] Unless otherwise provided by law, the Attorney General is charged under 28 U.S.C. §§ 516–20 with exclusive and plenary power

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to supervise and conduct all litigation to which the United States is a party. This power, however, because so broadly inclusive, must be narrowly construed. In this court's view, the power is limited to the conduct of pending litigation against the Government, and does not encompass exclusive control of other matters which, albeit related, are not yet so pending.

Attorney General ⇐ 7

Court of Claims jurisdiction; treaty claims.

[5] The jurisdictional requirement of 28 U.S.C. § 1502 means that the claim involved must not merely be related to or connected with the subject matter of the treaty, but that, absent certain express terms or provisions thereof, there could be no claim at all. Although the present claim arises because of the existence of a Memorandum of Understanding between the United States and the United Kingdom implementing the joint defense satellite communications program pursuant to which plaintiff's patented inventions were allegedly manufactured and used, said Memorandum does not purport to create a private cause of action, or remedy, for any infringements occurring in the course of the program. Plaintiff's claim therefore cannot be said to grow out of or be dependent upon the life and existence of the Memorandum, nor does it rely on the Government's omission to do anything which it promised to do under the Memorandum, but exists independently thereof.

Courts ⇐ 449(1)

Court of Claims jurisdiction; nonappropriated fund instrumentality; what constitutes.

[6] The jurisdictional prohibition of 28 U.S.C. § 2517, as judicially interpreted and developed, derives from two principles having a direct bearing upon this court's jurisdiction: (1) that the doctrine of sovereign immunity precludes suits against the Federal Government unless such immunity has been specifically waived by act of Congress, and (2) that before any expenditure of public funds can be made, there must be an act of Congress appropriating the funds and defining the purpose for such appropriation. Although the subject Memorandum of Understanding provided that costs incurred in connection with the Skynet II program by the United States, including potential judgments against the United States in patent infringement actions, were to be eventually reimbursed by the United Kingdom, the program was from its inception dependent upon, and specifically intended to be dependent upon, regular appropriated Department of the Air Force and Department of Defense funds, the use of which was authorized and governed by the 1968 Foreign Military Sales Act. Moreover, it is manifest that Congress specifically gave its sanction and support for the program's use of regular appropriated funds in the first instance. Accordingly, the court's jurisdiction of the present suit is not precluded by virtue of 28 U.S.C. § 2517.

Courts ⇐ 449(3)

Opinion of the Court

Court of Claims jurisdiction; patents; patent infringement; Foreign Military Sales Act.

[7] That the special patent infringement jurisdictional provision contained in predecessor acts (most recently Sec. 606 of the Foreign Assistance Act of 1961) was omitted from the 1968 Foreign Military Sales Act does not manifest congressional intent to eliminate this court's jurisdiction under 28 U.S.C. § 1498(a) over claims arising from the United States' foreign military sales activities, since the purpose of the 1968 Act was not wholly to supersede the 1961 Act but to amend and repeal respective provisions of the 1961 Act and to add certain new provisions thereto. Furthermore, since Sec. 606, and predecessors provisions, were inextricably connected with the expanding foreign military sales program, it is inconceivable that Congress, by omitting to expressly incorporate the provision into the 1968 Act, thereby intended to render that provision applicable only to non-sale varieties of foreign assistance.

Courts ⇐ 449(3)

Dugald S. McDougall, attorney of record, for plaintiff. *John E. Benoit*, of counsel.

Irving Jaffe, with whom was *Assistant Attorney General Rex E. Lee*, for defendant. *James D. Stokes, Jr.*, and *Barry Estrin*, of counsel.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, and KUNZIG, *Judge*.

COWEN, *Chief Judge*, delivered the opinion of the court:

This case, involving the alleged infringement of plaintiff's patent[1] pursuant to the Government's participation with the United Kingdom (U.K.) in a joint defense satellite communications program (Skynet II), requires us to decide four questions which concern this court's patent and general jurisdiction. These questions are:

(1) Whether the use or manufacture of plaintiff's patented invention, purportedly on behalf of the U.K. Government, constituted a use or manufacture "by or for the United States" sufficient to vest jurisdiction in this court under 28 U.S.C. § 1498(a);

[1] United States Letters Patent No. 3,758,051, entitled "Velocity Control and Orientation of a Spin-Stabilized Body," issued to plaintiff, Hughes Aircraft Co., on September 11, 1973, as assignee of the inventor and former Hughes employee, Donald D. Williams. There is no question that Hughes, as assignee of the accused patent, is the proper party in interest. *Wing Eng'r Corp. v. United States*, 138 Ct. Cl. 260, 151 F. Supp. 314 (1957).

(2) whether plaintiff's claim "grows out of" or is "dependent upon" the 1970 Memorandum of Understanding [2] between the U.S. and the U.K. so as to preclude this court's jurisdiction by virtue of 28 U.S.C. § 1502;

(3) whether the Skynet II program, insofar as U.S. expenses thereunder were to be fully reimbursed by the U.K., was a non-appropriated fund activity as to which this court lacks jurisdiction by virtue of 28 U.S.C. § 2517; and

(4) whether the omission from the 1968 Foreign Military Sales Act (FMSA), 22 U.S.C. §§ 2751–94 of the special patent infringement jurisdictional provision contained in predecessor statutes manifests congressional intent to eliminate this court's jurisdiction over claims arising from the Government's foreign military sales activities.

In addition to the instant suit, instituted on November 13, 1973, plaintiff on January 17, 1974, also commenced an action for infringement of the same patent [3] against the Philco-Ford Corp. and Marconi Co., Ltd. of Great Britain, in the U.S. District Court for the Middle District of Florida (Orlando Division), Civil Action No. 74–21–Orl–Civ–R. Defendants in that action moved for dismissal on the ground, *inter alia*, that plaintiff's claims involving the Skynet II program should have been brought in this court pursuant to 28 U.S.C. § 1498(a). By an order entered October 8, 1974, the district court denied defendants' motions but stayed further proceedings pending this court's determination in this case of the scope of our jurisdiction. Although not conceding the jurisdictional issue, plaintiff has taken the position that defendants' motions raise procedural rather than substantive

[2] Memorandum of Understanding Concerning Continued Cooperation in Defense Satellite Communications with Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland Represented by the Ministry of Defence (1970 MOU), April 1, 1970, annexed to *Defendant's Motion for Partial Dismissal* (*Defendant's Motion*) as Exhibit (Ex.) 14A.

[3] The Florida District Court action also involves a second patent, U.S. Reissue Patent No. 26,887, allegedly owned by William B. McLean and Walter G. Finch, co-plaintiffs with Hughes in that action, and exclusively licensed to Hughes. *Defendant's Motion*, at 5, and Ex. 3; *Plaintiff's Response to Defendant's Motion for Partial Dismissal* (*Plaintiff's Response*), at 1–2. Both patents were allegedly infringed in the production of the Skynet II F1 and F2 satellites, launched by the U.S. Government on January 19, 1974 (unsuccessfully), and November 22, 1974, respectively. The F1 satellite was fabricated in Great Britain by Marconi as prime contractor with the United Kingdom Government, using components manufactured and exported there by Philco-Ford as subcontractor. *Defendant's Motion*, at 5–6, and Ex. 3.

issues so far as plaintiff's interests are concerned. Therefore, plaintiff has elected not to oppose defendant's motion.[4] Since the affidavits and exhibits submitted in support of defendant's motion present for our consideration numerous matters outside the pleadings, we treat this motion as one for partial summary judgment. Ct. Cl. Rule 38(c); *Moore-McCormack Lines* v. *United States*, 188 Ct. Cl. 644, 648 n. 1, 413 F. 2d 568, 570 n. 1 (1969).

After long and careful consideration, we have concluded, for the reasons set forth below, that (1) plaintiff's patented invention was used and manufactured by and for the United States within the meaning of 28 U.S.C. § 1498(a); (2) plaintiff's claim is not dependent upon the 1970 MOU within the meaning of 28 U.S.C. § 1502; (3) Skynet II was an appropriated fund activity within the meaning of 28 U.S.C. § 2517; and (4) jurisdiction of infringement claims incident to foreign military sales was not eliminated by the omission of a provision therefor in the 1968 FMSA. Accordingly, we hold that plaintiff's claim lies properly within the intended and settled parameters of this court's jurisdiction under 28 U.S.C. § 1498(a), and that defendant's motion for partial summary judgment should therefore be denied.

I

Factual Background

The facts essential to our decision in this case, although complex, are not in dispute:[5]

[4] The Government's motion seeks only partial dismissal because plaintiff's petition alleges, albeit somewhat obliquely, that the Government's infringement also extended to acts undertaken outside of the Skynet II program. Although the Justice Department denied the Department of the Air Force permission to appear as amicus curiae in this proceeding, the Air Force position, in support of this court's jurisdiction of the case, is set forth in a memorandum annexed to *Defendant's Motion* as Appendix B thereof, Air Force Statement).

[5] These facts are substantially derived from *Defendant's Motion*, at 14–30, and Exhibits 11 through 15 thereof. Exhibits 11, 12, and 13, originally submitted by Marconi in support of its motion to dismiss the Florida district court action, comprise affidavits of Sidney Dobb, Marconi's Assistant Managing Director (Ex. 11); of F. W. Jackson, Marconi's Spacecraft Division Manager (Ex. 12); and of Robert A. W. Baker, Director of Contracts in the Procurement Executive, U.K. Ministry of Defence (Ex. 13), respectively. Exhibits 14 and 15 consist of affidavits of L. K. Moseman II, Deputy Assistant Secretary (Logistics), Department of the Air Force, U.S. Department of Defense (Ex. 14), and of Robert J. Goss, Mission Analysis and Integration Branch Chief (Delta Project), Goddard Space Flight Center, NASA (Ex. 15), respectively.

A. *The Skynet II Program*

The Skynet II system, a product of cooperative defense efforts of the U.S. and the U.K., is primarily utilized by the British Ministry of Defence to provide reliable satellite communication between permanent and mobile British military installations on a segment of the earth (the U.K. segment) extending from the U.K. in the west to Singapore and western Australia in the east. The first Skynet spacecraft, Skynet I, was fabricated and tested in the United States by Philco-Ford Corp., and is presently in a geostationary, synchronous orbit [6] above the Indian Ocean, at the center of the U.K. segment, controlled by the U.K. Telemetry Command Station at RAF Oakhanger, Hampshire, England, and used by nine U.K. earth stations throughout the U.K. segment.

The objectives of the U.S. and the U.K. Governments in the Skynet II program, undertaken to replace Skynet I, are partially set forth in the 1970 MOU.[7] According to the MOU, the U.S. Government was then proceeding to develop a second phase of its own defense satellite communications system (DSCS Phase II), while the U.K. Government also had a continuing operational requirement for defense satellite communications. It was therefore a long-term cooperative aim of the two Governments to introduce equipment with interoperable characteristics so that earth stations, whether U.S. or U.K., would be inherently capable of direct communications through U.S. DSCS satellites or U.K. satellites.[8] The U.K. Skynet Phase II satellites were in fact to comprise the U.K. segment of the U.S. defense satellite communications system. This cooperation was to continue until such time as the United States Government was in a position to

[6] A "synchronous orbit" is one wherein the satellite requires 24 hours to circle the earth, so that it remains stationary over a given geographical location on earth.

[7] *See* note 2 *supra*.

[8] This cooperative aim has been continued by means of another classified agreement, effective Jan. 30, 1975, entitled "Memorandum of Understanding Concerning the Shared Use of the US DSCS Phase II Satellites Over the Atlantic and West Pacific Oceans and the UK Skynet II Satellite to Meet US and UK Interoperability Requirements." Ex. 16, Attachment 16A; *Defendant's Motion*, at 19.

offer communication facilities to the U.K. in U.S. DSCS satellites situated over the Indian Ocean area.

Under the 1970 MOU, the U.K. Government was to procure its Skynet II satellites from a British prime contractor who would, in turn, be permitted to make use of U.S. subcontractors with the approval of the U.S. Government. The U.S. further agreed to grant the U.K. and its contractors the use of such technical information, design rights, patent rights and licenses vested in the U.S. Government as may be legally permissible, and to assist the U.K. in obtaining additional rights where necessary. Launch vehicles were to be procured by the U.S. on behalf of the U.K., and the U.S. agreed to launch the satellites into orbit using U.S. launching and satellite control facilities. Costs incurred by the U.S. on behalf of the U.K. were to be paid from a trust fund consisting of sums deposited therein by the U.K. with charges based on work performed in connection with the launch vehicles and services, the satellites, packing and transportation, and administrative services.

Following the launch and final positioning in earth orbit, the U.K. was to have sole communications and operational control over the Skynet II satellites, including attitude control, station-keeping and other command functions exercised by the U.K. ground control station at RAF Oakhanger, Hampshire, England. In the event of an emergency, however, the U.S. could assume operational control if so required by the U.K. Each Government was to provide the communications and control earth stations required for its own use.

The Patent Liability Section I of the 1970 MOU provided that each Government would follow its normal procurement practices in securing all rights considered essential for the program, including the procurement of material, services, documents and information to meet the special requirements of the other Government. Were such procurement to give rise to patent infringement claims or suits, any payments made by one Government in consequence thereof were to be repaid by the other Government. No claims were to be settled, however, without prior consultation with and agreement of the other Government.

B. *Plaintiff's Patent*

That part of the Skynet II system accused of infringing plaintiff's patent was designed to control the attitude or orientation of a spin-stabilized, military communications spacecraft while circling the earth in a synchronous orbit. The Skynet II spacecraft had a generally cylindrical body in which were mounted a number of subsystems, including communications, telemetry, tracking and command, reaction control equipment, and attitude and orbit control. The last of these subsystems is alleged to have made use of plaintiff's patent in the following manner: The principal communications of radio antenna of the spacecraft was designed to lie on the cylindrical body's central axis, or "spin" axis, and solar cells were arrayed on the outer surface of the cylindrical body. To obtain optimum antenna gain and solar cell illumination (i.e., in order to charge the spacecraft's batteries), it was important that the "spin" axis of the spacecraft be properly oriented with respect to the earth and sun while the spacecraft was in orbit. It was the intended function of the accused control subsystem to achieve and maintain such proper spacecraft orientation. To this end, the control subsystem included means for sensing the spacecraft's orientation with respect to the earth and sun, and for transmitting such data to a ground command station which, after analysis thereof, would in turn transmit commands back to the spacecraft's attitude control, thereby causing one or more of the spacecraft's hydrazine thrust motors (or thrusters) to fire for a predetermined period so as to correct or adjust the spacecraft's attitude or orientation.

C. *United Kingdom Involvement*

On July 30, 1970, the U.K. Ministry of Defence (then the Ministry of Technology) contracted with the General Electric Co., Ltd. of Great Britain (GEC) to develop and supply the Skynet II spacecraft. The contract included a provision that title to the Skynet II spacecraft would vest in and become the absolute property of the Ministry of Defence as the spacecraft was constructed. Subsequently, all work on the

Skynet II project was transferred to the Marconi Co., Ltd.[9] Fabrication of the spacecraft was conducted chiefly at Marconi's Applied Electronics Laboratories at Portsmouth, England.

In order to obtain certain components and other assistance necessary for the satellite's design and assembly, including solar panels, earth and sun sensors, nutation dampers, communication antenna, S-band antenna, S-band radio equipment, traveling wave tube amplifiers, thruster motors and hydrazine storage tanks, Marconi entered into subcontracts with a U.S. corporation, Philco-Ford. These components were thereafter shipped to England and incorporated into the satellite by Marconi.

After fabrication and testing by Marconi, the satellite was subjected to additional acceptance tests at Portsmouth, England, by the Ministry of Defence, during May through December 9, 1973. On December 11, 1973, the Ministry of Defence shipped the satellite via a Royal Air Force plane, from England to the United States Air Force Eastern Test Range (ETR) at the John F. Kennedy Space Center, Cape Canaveral, Florida. After arrival, the satellite was uncrated and subjected to further tests to check the integrity and compatibility of its electrical circuits and components. It is unclear whether the accused control system was, during this period, operated or used in the manner it was intended to be operated or used when the satellite was in orbit. No spinning of the satellite occurred, for example, and the hydrazine thrust motors were not fired and could not have been fired for safety reasons. After components testing, the satellite, together with the apogee boost motor, was mated to the third stage of a Thor-Delta booster provided by the National Aeronautics and Space Administration (NASA). The stage was then mechanically mated to a NASA Thor-Delta booster vehicle on the launch pad.

D. *U.S. Involvement*

U.S. responsibilities under the 1970 MOU generally entailed assisting the U.K. in the design, development, procure-

[9] The Marconi Co., Ltd., is a subsidiary of the English Electric Co., Ltd. which, in turn, is a subsidiary of GEC. Ex. 11, para. 2.

ment, launch and initial orbital support of its satellites, and the modification of U.K.'s ground Telemetry Command Station (TCS) at Oakhanger, England. Essentially, the U.S. provided (1) technical interface to ensure that the U.K.-procured satellites would be compatible with the U.S.-procured launch vehicles; (2) cryptographic equipment and training; (3) testing of certain elements of the Skynet II satellite ;(4) two launch vehicles and launch support; and (5) orbital support.

The foregoing United States activities were implemented by the Space and Missile Systems Organization of the U.S. Air Force (USAF/SAMSO) through procedures of the Foreign Military Sales Act (FMSA), 22 U.S.C. §§ 2751–94. In effect, the U.S. Government, as represented by the USAF/SAMSO, agreed to sell certain defense articles and services to the U.K. on a "dependable undertaking" cash basis for use in connection with the Skynet II program. This was accomplished by means of a series of sales agreements, called FMS cases, whereby specific U.S. offers of sale were duly accepted by the U.K. Pursuant to the U.S. Government's obligations under these FMS cases, the USAF/SAMSO performed the following activities: (1) Management and administration of certain Skynet II program activities as outlined in Section E of the 1970 MOU, (2) arrangements and/or authorizations for other USAF organizations to perform such Skynet II functions as apogee kick motor testing, launch/range support, and orbital support, (3) awards of USAF/SAMSO contracts to U.S. business concerns for various services, and (4) arrangements with NASA to provide Delta-type vehicles for launch of the satellite into synchronous equatorial orbits.

The different sections of the Delta launch vehicles used for Skynet II were procured by NASA under its own contracts with various U.S. companies. There was no NASA in-house manufacture, research or development specifically associated with the Skynet II program. Nor was NASA involved in the acquisition of the satellites themselves, although it did provide limited support for satellite ground checkout before launch. Thus, NASA's direct involvement with each Skynet II satellite was limited to the period from checkout

and mating of the satellite to the Delta launch vehicle on the ground, to the time that the satellite separated from the launch vehicle while in transfer orbit. At this latter point, SAMSO was to initiate tracking and command of the satellite for the purpose of placing it in final synchronous orbit. NASA's Skynet II activities, including its outside procurement of Delta launch vehicles and support services, and its office overhead, were fully reimbursed by the Air Force under the terms of a May 1, 1972, agreement.

On January 19, 1974, the U.S. Government, acting through NASA and the U.S. Air Force, launched the first Skynet II F1 satellite from the Air Force ETR. The launch was under the exclusive direction of the U.S. Government, and control and operation of the satellite itself was not scheduled to be transferred to the U.K. until some 28 days after launch. The Skynet II F1 launch, however, was unsuccessful, the satellite was not injected into the proper transfer orbit by the NASA Thor-Delta booster and, several days after launch, the satellite was presumed destroyed by heat generated as a result of its contact with the earth's atmosphere.

The second Skynet II F2 satellite, launched by NASA on November 22, 1974, from the Air Force ETR, achieved its proper transfer orbit and, thereafter, the Air Force Satellite Control Facility (SCF) in Sunnyvale, California, and its remote tracking stations, tracked and commanded the satellite during a 26-day post-launch period in order to place it into its final synchronous orbit station over the Indian Ocean. During this period, the SCF received telemetry data from the satellite, computed commands for attitude maneuvers, and transmitted such commands to the satellite in order to change its attitude or orientation. Once situated in its final station over the Indian Ocean, all control over the satellite (including attitude control) was transferred, on December 18, 1974, from the Air Force to the U.K. Government.

All U.S. Government activities under the Skynet II program, including personnel expenses, were ultimately funded in the same manner as other standard foreign military cash sales by the Department of Defense, which are at no cost to the United States. As earlier described, the Skynet II FMS cases were cash sale dependable undertakings (DD Form

1513, Letter of Offer), signed by the U.S. and the U.K. Governments, which established the funding authorization and included the applicable 2-percent administrative surcharge. The USAF subsequently provided articles and services using "reimbursable budget authorization," and its expenditures and the reimbursements thereof were conducted during the 4-year period through the standard FMS trust fund deposit arrangement. All Air Force funds used were appropriated funds which were subsequently reimbursed with United Kingdom funds. No non-appropriated USAF funds were used at any time.

Plaintiff Hughes filed its petition in this court, pursuant to 28 U.S.C. § 1498(a), on November 13, 1973, approximately 2 months prior to the first, unsuccessful launch of the Skynet II F1 satellite. Plaintiff's First Amended and Supplemental Petition, covering the Skynet II F1 launch, was filed on November 19, 1974, 3 days before the successful launch of Skynet II F2. A Second Supplemental Petition covering U.S. Government involvement in the Skynet II F2 project, was filed August 8, 1975. Defendant filed answers to plaintiff's original and amended petitions on May 13, 1974, and September 4, 1975, respectively. On July 18, 1975, defendant filed the instant motion for partial dismissal. Plaintiff filed a response on August 22, 1975, and the case was orally argued by defendant on January 6, 1976.

II

28 U.S.C. § 1498(a): Basic Patent Jurisdiction

By its express terms, 28 U.S.C. § 1498(a) vests exclusive jurisdiction in this court over patent infringement claims against the Government arising upon either one or both of the following two grounds: (1) unlicensed use or manufacture of a patented invention by the U.S. directly; and/or (2) unlicensed use or manufacture of a patented invention *for the U.S.* and *with its authorization or consent.*

Defendant contends that neither of these two grounds is present in the instant case, for the reasons, most simply stated, that (1) any use by the U.S. of plaintiff's patented invention was solely on behalf of and for the benefit of the U.K. Government; and (2) any authorization and consent

by the U.S. Defense Department was given extra-contractually and only after this litigation against the Government had already been commenced, exceeded that Department's authority, and was therefore of no legal effect. We disagree with both of these contentions. Since they involve separate questions of law and fact, in the interest of clarity we consider each contention separately.

A. *Manufacture "for the U.S."*

The second paragraph of § 1498(a), insofar as it clarifies and construes the meaning of the phrase "use or manufacture * * * for" the U.S., contained in the first paragraph thereof, sets forth a two-part test for determining whether this court has jurisdiction in the first instance [10] over a particular claim. Under this test, a finding of jurisdiction is conditioned upon a showing that (1) the accused use or manufacture was undertaken *for the Government*, i.e., for the Government's benefit; and (2) the Government gave its *authorization or consent* for the accused use or manufacture.

Those aspects of this case relating to "manufacture for" the U.S. concern the manufacture of the F1 and F2 satellites by, among others, the Philco-Ford Corp. and the Marconi Co. under contracts with the U.K. Government, for ultimate use in the Skynet II program. Thus, the first inquiry under § 1498(a), as above described, is whether the Skynet II program and the satellites manufactured pursuant thereto were for the benefit of the U.S. Government. We answer this question in the affirmative.

Defendant's affidavits and exhibits show that Skynet II was intended by the U.S. and U.K. Governments to be a cooperative program, vital to the military defense and security of both countries, and directed toward the replacement of the Skynet I satellites which formed the U.K. segment of the U.S. Defense Satellite Communications System (DSCS). According to the 1970 MOU, which created and implemented

[10] We use the phrase "in the first instance" to suggest that, even where § 1498 jurisdiction is otherwise established, such jurisdiction may nonetheless be precluded were we to find, as defendant argues in the instant case, that plaintiff's claim is dependent upon a treaty within the meaning of 28 U.S.C. § 1502, or involves non-appropriated fund activities within the meaning of 28 U.S.C. § 2517.

the program, one of its principal aims was to ensure the interoperability and shared use of U.S. and U.K. satellites so that each country could effectively augment its own defense communications capacity by direct and reciprocal utilization of the other country's capacity.[11] As stated by the Department of the Air Force,

> [I]t can be seen that the US involvement in the Skynet II program cannot be viewed as a mere sale of satellite launch services by an uninterested party. Rather, the furnishing of the launch equipment and services was directly related to US National Security as an integral step toward expanding the US defense satellite communications system via the shared use cooperative program set forth in the aforementioned MOU's [Air Force Statement, at para. 14.]

Clear evidence that Skynet II, consistent with similar defense programs, was undertaken for the direct benefit of the U.S. is found, wholly apart from the 1970 MOU, in the express language of the 1968 FMSA and predecessor acts. Section 1 of the FMSA, 22 U.S.C. § 2751, for example, defines the purpose of the Act in part as follows:

> The Congress recognizes, * * * that the United States and other free and independent countries continue to have valid requirements for effective and *mutually beneficial defense relationships* in order to maintain * * * international peace and security * * *. * The need for *international defense cooperation among the United States and those friendly countries to which it is allied by mutual defense treaties is especially important, since the effectiveness of their armed forces to*

[11] The 1975 MOU, unclassified portions of which were annexed to defendant's motion as Attachment 16A to Ex. 16, *see* note 8 *supra*, also recognizes that the U.S. and U.K. "each [has] a requirement for and desire to achieve interoperable satellite communication links over the satellites of either the USG or HMG between certain of each other's specified earth terminals and associated communication facilities." 1975 MOU, para. 10. It also recognizes that each country has "additional requirements for and desire to obtain the allocation of channels in satellite links between certain specified UK earth terminals and between certain specified US earth terminals, respectively." 1975 MOU, para. 11. To meet these requirements and desires, the agreement provides that "[e]ach nation will be able to achieve a greater communications coverage and be able to develop communication systems which will be more flexible than could otherwise be realized." 1975 MOU, Sec. A, para. 1. In addition, "[t]he use by the USG of satellite capacity and ground communications facilities made available by HMG under this agreement will be only for those unique and vital communications associated with *US National Security requirements.*" (Emphasis added.) 1975 MOU, Sec. A, para. 2.

*act in concert * * * is directly related to the operational compatibility of their defense equipment.*

Accordingly, *it remains the policy of the United States to facilitate the common defense* by entering into international arrangements with friendly countries which further the objective of applying agreed resources of each country to programs and projects of cooperative exchange of data, research, development, production, procurement, and logistics support *to achieve specific national defense requirements and objectives of mutual concern. To this end, this chapter authorizes sales by the United States Government to friendly countries * * * in furtherance of the security objectives of the United States.* * * * (Emphasis added.)

See also §§ 2 and 3(a) of the 1968 FMSA, 82 Stat. 1322, *as amended* 22 U.S.C. §§ 2752 and 2753(a). Moreover, as more fully discussed in Part V of this opinion, *infra*, each act since 1951 included a special provision vesting jurisdiction in this court or the appropriate district court of any patent infringement claims arising in connection with the Government's foreign military sales and assistance activities. *See* Foreign Assistance Act of 1961, § 606, 75 Stat. 440, 22 U.S.C. § 2356; Mutual Security Act of 1954, § 506, 68 Stat. 852; Mutual Security Act of 1951, § 517, 65 Stat. 382. The purpose of this provision was to remove any doubt that such activities were *for the U.S.* within the meaning of 28 U.S.C. § 1498 and that, hence, the principles of § 1498 were fully applicable to mutual security/foreign military assistance procurement on the part of the Government. *See* S. Rep. No. 612, 87th Cong., 1st Sess. 30 (1961); H. Rep. No. 851, 87th Cong., 1st Sess. 66–67 (1961); H. Rep. No. 1925, 83d Cong., 2d Sess. 95 (1954); H. Rep. No. 872, 82d Cong., 1st Sess. 57 (1951); *Hearings on H.R. 5020 and H.R. 5113 Before the House Committee on Foreign Affairs*, 82d Cong., 1st Sess., at 1420 (1951); *Kaplan* v. *United States*, 139 Ct. Cl. 682, 685–87, 153 F. Supp. 787, 788–89 (1957); Pasley & TeSelle, *Patent Rights and Technical Information in the Military Assistance Program*, 29 Law & Contemp. Prob. 566, 576 (1964). Since we conclude, in Part V of this opinion, that this special jurisdictional provision is still in force, notwithstanding Congress' failure to expressly incorporate it into the 1968 FMSA, it follows that Skynet II, as implemented by that Act, was *for*

the U.S. within the meaning of 28 U.S.C. § 1498(a). Under these circumstances, we have little difficulty concluding that the Skynet II program was undertaken as much for the benefit of the U.S. as for the U.K.

The second and more difficult question under § 1498(a), however, is whether the Government gave its authorization and consent for any infringements which might occur under the Skynet II program. In the Florida District Court action,[12] defendants Philco-Ford and Marconi moved to dismiss on the ground, *inter alia*, that the U.S. Defense Department, in correspondence [13] transmitted to the U.K. Ministry of Defence in July 1974, had given the Government's express authorization and consent to such infringement, thereby bringing the case within this court's exclusive jurisdiction. This letter of authorization and consent (the Reed clause), prompted by an official request of the U.K. Government,[14] stated that:

> [T]he Skynet II Program is a joint effort by the USG and HMG for the mutual benefit of both governments pursuant to the cooperative agreement under the 1970 MOU * * *. [As the Marconi Co.'s services concerning Skynet II F2 under contract with HMG] are similar to those performed by Marconi on Skynet II F1 and since these services apparently comprise part of Hughes complaint in Civil Action 74–21 [Florida District Court], it is conceivable that Hughes may file a like complaint against Marconi to enjoin its performance of these services on Skynet II F2. Because Marconi's services are a necessary step prior to the launch conducted by the USG, such an injunction would effectively enjoin indefinitely the United States Government from performing its satellite launch obligations under the MOU and interrupt a USG national defense oriented program. *Thus, although Marconi is under an express contract with HMG, its services are also considered to be "for" the USG via the cooperative program established by the*

[12] *See* note 3 *supra* and accompanying text.

[13] The statement of authorization and consent is set forth in a letter, dated July 19, 1974, from Thomas C. Reed, Director, Telecommunications and Command and Control Systems, Office of the U.S. Secretary of Defense, to Dr. D. G. Kiely, Director General, Telecommunications Procurement Executive, U.K. Ministry of Defence.

[14] Letter dated May 21, 1974, from Mr. J. G. Lewis, Deputy Head, Defense Reserve and Development Staff, British Embassy, Washington, to Mr. David L. Solomon, Deputy Assistant Secretary (Operations and Engineering), Office of the U.S. Secretary of Defense.

MOU, bringing these services within the eminent domain provisions of 28 U.S.C. 1498(a).

* * * * *

In view of the foregoing, and in the spirit of Section I of the MOU requiring each Government to "* * * follow its normal procurement practices in securing all rights it considers essential for the purposes of this MOU, including the procurement of * * * services * * * to meet the special requirements of the other Government * * * *" *the United States Government hereby gives its authorization and consent, without prejudice to any rights of indemnification, for all use and manufacture of any invention described in and covered by U.S. Patent Numbers 3,758,051 and Re-issue 26,887, in the performance of the obligations of HMG under the MOU and in the performance of the obligations of the Marconi Company under its contract by HMG for services to be performed in this country relative to the Skynet II F2 satellite prior to its launch.* (Emphasis added.)

In response to a subsequent letter from the U.K. Defence Ministry, dated July 26, 1974, inquiring whether the Government's consent was intended to have retroactive effect so as to include prior activities relating to Skynet II Fl, Mr. Reed, acting for the Defense Department, stated that:

> [T]he U.S. is pleased to inform you that the authorization and consent contained in the last paragraph of my letter of July 19, 1974, shall apply respectively to SKYNET II F1.

The Department of Justice has vigorously contended, both in its brief and at oral argument, that the foregoing correspondence exceeds the Defense Department's authority and can have no legally operative effect for several reasons. First, a Government official cannot confer jurisdiction upon a Federal court which such court has not otherwise been authorized by statute to exercise. *Huther* v. *United States*, 136 Ct. Cl. 655, 659, 145 F. Supp. 916, 918 (1956). Nor may lack of jurisdiction be waived or overcome by agreement of the parties, *Rolls-Royce, Ltd.* v. *United States*, 176 Ct. Cl. 694, 702, 364 F. 2d 415, 420 (1966), or by stipulation of a Government attorney. *Otis Elevator Co.* v. *United States*, 18 F. Supp. 87, 89 (S.D.N.Y. 1937). These principles, albeit correct, are not to the point. This is not a case wherein a Government official has purported to confer jurisdiction on this court which we

are not otherwise authorized by statute to exercise. As earlier discussed, § 1498(a) plainly authorizes jurisdiction in this court over infringement claims involving manufacture by a contractor for the Government and with the Government's authorization or consent.

Nor is this a case wherein the parties are seeking, by waiver, agreement, or stipulation, to overcome a lack of jurisdiction. On the contrary, the Reed clause, in our view, constitutes the clear functional equivalent of the standard blanket authorization and consent clause utilized in regular defense contracts pursuant to Part 9 of the Armed Services Procurement Regulations (ASPR).[15] To fall within the ambit of the ASPR clause, just as to fall within the ambit of the Reed clause involved in this case, the accused manufacture need only have occurred in the performance of the contract or, as here, the Skynet II program. Indeed, the stated purpose for the Reed clause, as well as the purpose for inserting such clauses in defense contracts generally, comports with the broad purpose and policy of § 1498(a) to cloak with immunity from injunction certain types of activity deemed vital to U.S. interests or objectives. *See Carrier Corp.* v. *United States*, 208 Ct. Cl. 678, 685, 534 F. 2d 244, 248–49 (1976); *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331, 342–43, 345 (1928); *Bereslavsky* v. *Esso Standard Oil Co.*, 175 F. 2d 148, 150 (4th Cir. 1949).

Nor, finally, is there any requirement that authorization or consent necessarily appear on the face of a particular contract.[16] On the contrary, " 'authorization or consent' on the

[15] The ASPR clause reads as follows:

"The Government hereby gives its authorization and consent for all use and manufacture of any [patented] invention * * * in the performance of this contract or any part hereof or any amendment hereto or any subcontract hereunder. * * *" ASPR § 9–102.2, 32 C.F.R. § 9.102–2.

[16] Nor, it must be noted, need the U.S. be a direct party to the contract at issue where, as here, circumstances unquestionably indicate that the U.S. was to be a principal beneficiary thereof. Defendent's reliance on *Yassin* v. *United States*, 110 Ct. Cl. 211, 221, 76 F. Supp. 509, 515 (1948), in this regard is misplaced. In *Yassin*, plaintiff claimed entitlement to sue the U.S. and certain U.S. contractors therewith for patent infringements by the U.K. Government pursuant to both the Lend-Lease Act and a wartime patent interchange agreement between the U.S. and the U.K. In that case, decided on a demurrer to plaintiff's petition, the court stated that there was no allegation as to when or where the alleged infringing structures were manufactured and that the only use alleged was one outside the territorial limits of the United States. More importantly, there was no express authorization and consent by the United States for the manufacture of the structures.

part of the Government may be given in many ways other than by letter or other direct form of communication"—*e.g.*, by contracting officer instructions, by specifications or drawings which impliedly sanction and necessitate infringement, by *post hoc* intervention of the Government in pending infringement litigation against individual contractors. II *Bulletin of the Judge Advocate General* 75 (1943), SPJGP 1943/881 (Feb. 8, 1943); *see Molinaro* v. *Watkins-Johnson CEI Div.*, 359 F. Supp. 467, 470–71 (D.Md. 1973); *Bereslavsky* v. *Esso Standard Oil Co.*, *supra*, 175 F. 2d at 151. Indeed, the cases wherein the Government has intervened to proffer retroactive consent and have the action transferred to this court, *see, e.g.*, *Roberts* v. *Herbert Cooper Co.*, 236 F. Supp. 428 (M.D. Pa. 1959), provide the nearest analogue to the situation we confront in the instant case.

We also can find no merit in the Justice Department's final reason for contesting the validity of the Reed clause, i.e., that the Defense Department lacked authority to act for the Government after the Hughes litigation had already been commenced. Certainly, there can be no dispute that, unless otherwise provided by law, the Attorney General is charged by statute with exclusive and plenary power to supervise and conduct all litigation to which the U.S. is a party. 28 U.S.C. §§ 516–20; *see S&E Contractors, Inc.* v. *United States*, 406 U.S. 1, 12–15 (1971); *Case* v. *Bowles*, 327 U.S. 92, 96–97 (1946). Indeed, it was on the basis of this power that the Department of Justice denied the request of the Department of the Air Force to appear as amicus curiae in this case. This power, however, because so broadly inclusive, must be narrowly construed. *United States* v. *Daniel, Urbahn, Seelye and Fuller*, 357 F. Supp. 853, 858 (N.D. Ill. 1973). In our view it is limited to the conduct of pending litigation against the Government, and does not encompass exclusive control of other matters which, albeit related, are not yet so pending.

In the instant case, it is plain that the Hughes litigation pending against the Government in this court did not, at the time the Reed letter was transmitted to the U.K. Defence Ministry, encompass claims or matters relating to Skynet II *F2*, but only those relating to F1. Hughes commenced suit in this court on January 17, 1974. The petition, while not speci-

fying F1 *per se*, did not allege, nor could it possibly have alleged, acts of infringement related to the F2 project, since the latter had not begun. The Reed clause was transmitted to the U.K. Government by letter dated July 19, 1974, during the period when progress on F2 was fully underway. In fact, the principal purpose of the U.K. request for such a clause was expressly stated to be the avoidance of any indefinite postponement of the Skynet II F2 project, scheduled for November 22, 1974, launching, by the issuance of an injunction in the Florida District Court proceeding. The Hughes petition in this court, however, was not amended to include acts relating to F2 until August 8, 1975, fully one year following the Reed correspondence. It follows, therefore, that at the time of the Government's authorization and consent regarding the Skynet II F2 project, that project was not yet the subject of pending litigation against the Government of which the Justice Department would necessarily have had exclusive supervision and control.

Since we conclude that the Defense Department—inasmuch as it was specifically charged with coordination of U.S. Skynet II activities, including procurement activities—properly and timely acted within the scope of its authority in giving the Government's authorization and consent, it is unnecessary to address the further question of whether such consent could validly be made retroactive, as the Defense Department intended, so as to include acts of infringement relating to the F1 project. Having found that this court has jurisdiction under the "manufacture for" provision of § 1498(a), we leave such questions to subsequent proceedings to determine the extent, if any, of the Government's liability with respect to its activities pursuant to the Skynet II program generally.

B. *Use "by the United States"*

Even if the Government had not given its express authorization and consent, our jurisdiction of the case under the "use by" provision of that section would remain undisturbed. As earlier described, once the Skynet II satellites (both F1 and F2), including the accused orientation control system, were fabricated and delivered by the U.K. Government to the John F. Kennedy Space Center in Cape

Canaveral, Florida, the U.S. Government, acting through NASA and the Air Force, assumed full and exclusive control of the project. Thus, from the time of the satellite's delivery in the United States to the time of its separation from the launch vehicle while in transfer orbit, NASA and/or the Air Force assumed sole responsibility for, *inter alia*, testing of the satellite's components and systems, and procurement, testing and mating of the launch motors and vehicles. Thereafter, NASA launched the spacecraft and, following achievement of the proper transfer orbit, the Air Force Satellite Control Facility (SCF) in Sunnyvale, California, assumed sole responsibility for the satellite's tracking and command during the 26-day period preceding F2's positioning into its final synchronous orbit.

In sum, NASA and/or the U.S. Air Force exercised direct and exclusive control of the F1 satellite for approximately 39 days (Dec. 11, 1973–Jan. 19, 1974), and of the F2 satellite for approximately 65 days. Although there is some question as to whether the accused invention was actually used in the manner intended with respect to F1, there would seem but little question that it was so used by the U.S. during at least some part of the 26-day post-launch period with respect to F2. Accordingly, the only possible argument which defendant could raise concerning this court's jurisdiction under the "use by" provision of § 1498(a) is that such use, albeit admittedly direct, exclusive and substantial, was nonetheless made solely on behalf of and for the benefit of the U.K. Since we have already considered and rejected this argument, however, and have found that the Skynet II program was conducted for the direct and mutual benefit of both Governments, we conclude that this court has jurisdiction of the case under 28 U.S.C. § 1498(a). It remains to consider whether our exercise of such jurisdiction, as defendant urges, is nonetheless precluded by virtue of 28 U.S.C. § 1502, 28 U.S.C. § 2517, and/or 22 U.S.C. §§ 2751–94.

III

28 U.S.C. § 1502: The Treaty Preclusion

Defendant contends, irrespective of § 1498(a), that because plaintiff's claim arises solely upon the basis of the 1970 MOU

between the U.S. and U.K. Governments, implementing the Skynet II program, this court lacks jurisdiction of the case by virtue of 28 U.S.C. § 1502. We disagree. Section 1502 provides that:

> Except as otherwise provided by Act of Congress, the Court of Claims shall not have jurisdiction of any claim against the United States *growing out of or dependent upon* any treaty entered into with foreign nations. (Emphasis added.)

Whether this section precludes our jurisdiction turns, of course, upon the proper meaning to be accorded the phrase "growing out of or dependent upon" as applied to the facts of the instant case. Unfortunately, defendant, in its brief, does not address this critical issue, but concerns itself, instead, with establishing that (1) the 1970 MOU prescribed the U.S. role in the Skynet II program, and (2) international executive agreements may be considered as treaties for purposes of § 1502. We concur in defendant's latter contention,[17] but regard the former as immaterial. The real issue to be determined for purposes of § 1502 is not, as defendant apparently urges, whether the *Government's* activities were delimited by or dependent upon the 1970 MOU (which would presumably have bearing upon its defense to this action), but whether *plaintiff's claim* so depends. *See S.N.T. Fratelli Gondrand* v. *United States*, 166 Ct. Cl. 473, 478 (1964). The test under § 1502 is whether plaintiff's claim could conceivably exist independently of, or separate and apart from, the subject treaty, or whether, on the contrary, it derives its existence so exclusively and substantially from certain express terms or provisions thereof, that consideration of the claim would necessitate our construction of the treaty itself. Review of the numerous decisions under § 1502 and predecessor

[17] The 1970 MOU was neither proclaimed by the President, ratified by the Senate, nor submitted for ratification, as required for treaty status pursuant to Article II, Section 2 of the Constitution. Nevertheless, as defendant correctly points out, this court has in the past equated international executive agreements with treaties for purposes of Section 1502. *See Yassin* v. *United States, supra,* 110 Ct. Cl. at 225, 76 F. Supp. at 517. The reason for this equation is that the fundamental separation-of-powers policy underlying § 1502, i.e., to avoid undue judicial interference (*e.g.,* by construction of particular treaty terms and provisions) with the Executive Branch's conduct of foreign relations, is equally applicable to both forms of international compact. *See Great Western Ins. Co.* v. *United States,* 112 U.S. 193, 200 (1884).

statutes reveals how narrowly the operative phrase "growing out of or dependent upon" has been interpreted.

In *S.N.T. Fratelli Gondrand* v. *United States*, *supra*, the most recent case construing § 1502, plaintiff, an Italian corporation, sought compensation for property taken from it during 1942–43 by the U.S. Armed Forces cooperating in the British occupation of Eritrea. Since a threshold question was the effect of the 1947 Italian Peace Treaty, whereby Italy waived its nationals' claims against the U.S. for war-related damage, the Government contended that the court lacked jurisdiction by virtue of § 1502. In rejecting this contention, Judge Davis, writing for the court, stated:

> [W]e think that [§ 1502] does not prevent our deciding whether plaintiff's claim is precluded by the Italian Treaty. *The jurisdictional prohibition applies only to those cases where "the right itself, which the petition makes to be the foundation of the claim, * * * [has] its origin—derive[s] its life and existence—from some treaty stipulation.*" (Emphasis added.) *United States* v. *Weld*, 127 U.S. 51, 57 (1888) * * *. See also, *Great Western Ins. Co.* v. *United States*, 112 U.S. 193, 197–98 (1884); *Eastern Extension Tel. Co.* v. *United States*, 231 U.S. 326, 333 (1913); *Falcon Dam Constructors* v. *United States*, 136 Ct. Cl. 358, 364–65, 142 F. Supp. 902, 906–07 (1956); *Societe Anonyme Des Ateliers Brille Freres* v. *United States*, 160 Ct. Cl. 192, 196–199 (1963).
>
> Here, the situation is the reverse. In no direct sense does the plaintiff's claim derive "its life and existence" from the Treaty; the claim is founded, rather, on the Constitution, the principles governing government contracts under the Tucker Act, and the Rules of Land Warfare. It is the Government which brings the Treaty to the fore as a defense; the claim itself, as distinguished from the defense, neither grows out of nor depends upon the Treaty. We think that 28 U.S.C. § 1502, as its words read and as it has been construed, permits the court to pass upon a treaty issue raised as a defense to a claim which is independent of the treaty. The prohibition is not framed, nor has it been applied, as forbidding this court to construe or apply a treaty. Rather, the statute is a jurisdictional provision directed to the plaintiff's own case and claim, not to the defendant's position. [166 Ct. Cl. at 477–78.]

For § 1502 to be applicable under *Fratelli* and the cases cited therein, that is, for a claim to "grow out of" or be "de-

pendent upon" a treaty, "the *right itself*, * * * the foundation of the claim, must have its origin—derive its life and existence—from some treaty stipulation." *United States* v. *Weld*, 127 U.S. 51, 57 (1888) (Emphasis in original.) This requirement means that the claim involved must not merely be related to or connected with the subject matter of the treaty, but that, absent certain express terms or provisions thereof, there could be no claim at all. The *Weld* case itself, which first clearly articulated this principle, provides an apt demonstration of its application.

Weld involved a claim against the Government for the unpaid balance of a judgment rendered in plaintiffs' favor by the Court of Commissioners of Alabama Claims. That court had been specially reconstituted, pursuant to the Act of June 5, 1882, to adjudicate claims of U.S. citizens against the British Government arising from maritime losses inflicted during the Civil War by the Confederate cruisers ALABAMA and FLORIDA, which were built and supplied by the British Government. Funds necessary to satisfy such claims, although drawn directly from congressional appropriations, were initially paid into the U.S. Treasury by the British Government pursuant to the Alabama Claims Treaty (the Treaty of Washington) and the Geneva Award. In affirming the Court of Claims decision and rejecting the Government's contention that plaintiff's claim was barred by § 1066, Rev. Stat. (the predecessor of § 1502), the Supreme Court, in addition to setting forth the principle quoted above, distinguished between a treaty which by its terms creates a specific private cause of action, and a treaty which creates merely a general, intergovernmental compact or arrangement, the subject matter of which may form a part of a cause of action otherwise created by Constitution or statute. As stated by the court:

> It may be said, in opposition to [our] view of the case, that, had there been no treaty of Washington, there would have been no fund * * * to distribute, the act of June 5, 1882, [creating the Court of Commissioners of Alabama Claims] would never have been passed, and therefore, that the treaty is the basis of all the subsequent legislation, and consequently the basis of this claim; in other words, that, therefore, this claim is "dependent upon and grows out of" the treaty of Washington.

Opinion of the Court

> We are of opinion, however, that such a *dependency upon* or *growing out of*, is too remote to come within the meaning of § 1066, Rev. Stat. In our view of the case, the statute contemplates a *direct* and *proximate* connection between the treaty and the claim, in order to bring such claim within the class excluded from the jurisdiction of the Court of Claims. * * * 127 U.S. at 57. (Emphasis in original.)

Thus, in *Weld*, the court held that plaintiffs' claim, although occasioned by Great Britain's Alabama Claims Treaty and award of money to the U.S., was not *created* by that treaty, but was *created* by subsequent act of Congress vesting authority to initially determine such claims in a special court of commissioners.

In accord with *Weld's* narrow construction of § 1502 is *Societe Anonyme Des Ateliers Brillie Freres* v. *United States*, 160 Ct. Cl. 192, 196–99 (1963), also relied on by the court in *Fratelli*, *supra*, 166 Ct. Cl. at 477. In *Societe Anonyme*, a case factually much closer than *Fratelli* to the instant case, plaintiff, a French corporation, sought to recover settlement funds held by the U.S. pursuant to an escrow agreement and relating to the U.S. use, as licensee, of plaintiff's patents during World War II. Under the agreement, the funds were to be held in escrow pending determination of the applicability of a Memorandum of Understanding between the U.S. and French Governments (the Byrnes-Blum Agreement), whereby France had agreed to pay its nationals' war-related claims against the U.S. The Government contended that the court lacked jurisdiction by virtue of § 1502. In rejecting this contention, the court, in an opinion by Chief Judge Jones, stated:

> [T]he Supreme Court 5 years later [after *Weld*] held that a case *growing out of* a treaty is one involving rights given or protected by a treaty, and is analogous to a case arising under the Constitution or laws of the United States. *United States* v. *Old Settlers*, 148 U.S. 427, 468–69 (1893). A case arises under the Constitution or laws of the United States whenever its decision depends upon the correct construction of either. [Citation omitted.]
>
> The Byrnes-Blum Agreement has not been drawn into consideration in this case in the manner anticipated by the Supreme Court in the *Old Settlers* case, *supra*. We agree that there is a connection between the Agree-

ment and the suspense account which has been presented to us for construction. Indeed, this case would never have arisen were it not for the existence of the Byrnes-Blum Agreement, because it is that very Agreement that motivated the parties to establish the "escrow" account around which this dispute is centered. Yet that is a far cry from finding that the claim before us "derives its life and existence" from some treaty stipulation, as the *Weld* case, *supra*, would require. Instead, the substance of plaintiff's claim is derived from the original patent license contract. [160 Ct. Cl. at 197–98.]

The court's reasoning in *Societe Anonyme* is in our view squarely applicable to the instant case. As in *Societe Anonyme*, the instant case, too, "would never have arisen were it not for the existence of" the 1970 MOU, since that agreement implemented the Skynet II program pursuant to which plaintiff's patented inventions were manufactured and used, thereby generating this instant litigation. But that connection is, under the decisions herein discussed, "a far cry from finding that the claim before us 'derives its life and existence' from some treaty stipulation." 160 Ct. Cl. at 197.

We look in vain to the petition and supplements thereto for even a reference to the 1970 MOU. Nor, indeed, would any such reference have been particularly useful, inasmuch as the MOU outlines in only general terms a complex bilateral program whose execution by necessity had to be left to certain delegated agencies and personnel acting pursuant to their own procedures and discretion. Section I of the 1970 MOU, entitled "Patent Liability," the only section directly pertinent here, illustrates this point. Section I states:

1. Each Government will follow its normal procurement practices in securing all rights it considers to be essential for the purposes of this MOU, including the procurement of material, services, documents and information to meet the special requirements of the other Government.
2. Each Government will give the other immediate notice of any claim asserted or suit or action filed hereafter for compensation for unlicensed use of patent rights * * *. No such claims will be settled without prior consultation with, and agreement of, the other Government except under an award by a court of competent jurisdiction.

3. Any payments made by one Government in consequence of any claims, suits or actions arising under paragraph 2 of this Section will be repaid by the other Government.

As can readily be seen, plaintiff's claim does not, nor could it, derive from Section I, since that Section does not purport to create a private cause of action or remedy for any infringements occurring in the course of the Skynet II program. It merely provides, in general terms, for the two Governments' reciprocal indemnity should such claims as might otherwise arise be successfully litigated. In short, the 1970 MOU presents—in the language of *Societe Anonyme*, *supra*, 160 Ct. Cl. at 198—only a "backdrop" against which the Government's allegedly infringing activities may be more broadly measured.

When properly viewed from the vantage point of the petition, it is clear that plaintiff's claim does not rely on the Government's omission to do anything which it promised to do under the 1970 MOU. In this respect, it is to be distinguished from the contractors' claims in *Falcon Dam Constructors* v. *United States*, 136 Ct. Cl. 358, 364, 142 F. Supp. 902, 906 (1956), which sought (unsuccessfully, for want of jurisdiction) to hold the Government liable for increased costs resulting from its alleged failure to furnish the drawings, materials and equipment which it promised to furnish plaintiffs under the express terms of its treaty with Mexico (concerning the construction of dams on the Rio Grande River).

In sum, we find plaintiff's claim no more directly or proximately intertwined with the 1970 MOU than was the escrow agreement with the Byrnes-Blum Treaty in *Societe Anonyme*, the Court of Commissioners Act with the Alabama Claims Treaty in *Weld*, or the taking claim with the Italian Peace Treaty in *Fratelli*. Accordingly, we conclude that § 1502 presents no bar to our exercise of jurisdiction in this case.

IV

28 U.S.C. § 2517: The Non-Appropriated Fund Preclusion

Defendant next contends that our jurisdiction is precluded on the ground that Skynet II was a non-appropriated fund

program. Relying primarily on *Interdent Corp.* v. *United States*, 203 Ct. Cl. 296, 298–99, 488 F. 2d 1011, 1012–13 (1973) and *Kyer* v. *United States*, 177 Ct. Cl. 747, 751–52, 369 F. 2d 714, 718 (1966), *cert. denied*, 387 U.S. 929 (1967), it urges that, since all expenditures made by the U.S. in connection with the Skynet II program were, under the terms of the 1970 MOU, as implemented by the 1968 Foreign Military Sales Act (FMSA), 22 U.S.C. §§ 2751–94, to be fully reimbursed by the U.K., that program was not supported by appropriated funds from which a judgment could properly be paid, as required by 28 U.S.C. § 2517.[18] We do not agree.

The longstanding jurisdictional prohibition of § 2517, as judicially interpreted and developed, derives from two historic and related principles having a direct bearing upon this court's unique jurisdiction. The first such principle is that the doctrine of sovereign immunity precludes suits against the Federal Government unless such immunity has been specifically waived by act of Congress. *United States* v. *Clarke*, 33 U.S. (8 Pet.) 436, 443 (1834); *Hopkins* v. *United States*, 206 Ct. Cl. 303, 306, 513 F. 2d 1360, 1362, *cert. granted*, 423 U.S. 821 (1975). The second principle is that before any expenditure of public funds can be made, there must be an act of Congress appropriating the funds and defining the purpose for such appropriation. Thus, no officer of the Federal Government is authorized to pay a debt due from the U.S., whether or not reduced to a judgment, unless an appropriation has been made for that purpose. *Reeside* v. *Walker*, 52 U.S. (11 How.) 271, 275 (1850).

The juncture of these two principles was first recognized by the Supreme Court in *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942), which held unconstitutional the application to Army post exchanges of a state tax on motor fuel distribution. Although military post exchanges "are arms of the Government," nonetheless, the Court stated, "The Government assumes none of the financial obligations" of such exchanges. 316 U.S. at 485. Out of the Court's holding in

[18] Section 2517, entitled "*Payment of Judgments*," provides, in pertinent part, as follows:

"(a) Every final judgment rendered by the Court of Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court."

Johnson developed a succession of decisions primarily dealing with military post exchanges, wherein this court held that it lacked jurisdiction of claims against non-appropriated fund activities. *See, e.g., Hopkins* v. *United States*, *supra; Manning* v. *United States*, 200 Ct. Cl. 756 (1973); *Fenton* v. *United States*, 199 Ct. Cl. 1009 (1972); *Covington* v. *United States*, 186 Ct. Cl. 960 (1969); *Fermin* v. *United States*, 184 Ct. Cl. 806, *cert. denied*, 393 U.S. 918 (1968).

As previously stated, defendant relies principally upon two decisions similar to those cited above. *Interdent*, *supra*, involved a claim under § 1498(a) arising from the Government's alleged infringement through the unlicensed sale by military post exchanges of plaintiff's patented oral irrigator. In dismissing plaintiff's claim for lack of jurisdiction, the court held that

> [a]lthough [the post exchanges] are parts of the Federal Government * * *, and their operations are carried on by Federal officers and employees, their contracts and transactions did not * * * bind appropriated funds or create a debt of the United States which could be vindicated in this court. The theory has been that, since our judgments are paid only from appropriated funds, in order to be actionable here the transaction sued upon must be one which, in the contemplation of Congress, can obligate public monies. "If Congress has indicated that public funds shall not be involved, we cannot grant the relief requested." *Kyer* v. *United States*, 177 Ct. Cl. 747, 751–52, 369 F. 2d 714, 718 (1966). [203 Ct. Cl. at 299, 488 F. 2d at 1013.]

Similarly, in *Kyer*, *supra*, plaintiff, a distilled spirits broker, sued for commissions allegedly earned by securing purchasers for industrial alcohol made from surplus grapes, pursuant to a brokerage contract with the Grape Crush Administrative Committee established by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, as amended. In dismissing plaintiff's claim, the court held that, although the Act permitted the Secretary of Agriculture, at his discretion, to obligate public funds for the program if necessary, it also created, by express statutory provision, a self-funding scheme whereby, with respect to the Grape Crush Committee, the committee's general expenses could be totally supported by handler (processor or distrib-

utor) contributions, and its surplus disposal costs totally financed by producer contributions. Since the Secretary, consistent with congressional intent, determined that the committee could, and in fact it did, operate entirely under this self-funding scheme, without resort to any appropriated funds whatsoever, the court concluded that public funds were never made available to the committee, that the committee was not in any sense authorized to obligate such funds, and that therefore plaintiff's claim could not be satisfied, as required, from any specifically appropriated source. 177 Ct. Cl. at 752–53, 369 F. 2d at 719.

Upon careful consideration, we do not believe that either *Interdent* or *Kyer* is controlling here. As distinguished from these cases, which involved entities (i.e., the military post exchanges and the Grape Crush Administrative Committee, respectively specifically intended to operate without using appropriated funds, the Skynet II program involved in the instant case was from its inception dependent upon, and specifically intended to be dependent upon, regular appropriated Department of the Air Force/Department of Defense funds.[19]

The use of such funds for purposes of the Skynet II program, as defendant's submissions make abundantly clear, was authorized and governed by the 1968 Foreign Military Sales Act (FMSA). Section 21 of that Act, 22 U.S.C. § 2761, provides:

> § 2761. *Cash sales from stock*
> The President may sell defense articles from the stocks of the Department of Defense and defense services of the Department of Defense to any friendly country or international organization if such country or international organization agrees to pay not less than the value thereof in United States dollars. Payment shall be made in advance or, as determined by the President to be in the best interests of the United States, *within a reasonable period not to exceed one hundred and twenty days after the delivery of the defense articles or the rendering of the defense services.* (Emphasis added.)

[19] Although NASA also made substantial expenditures in connection with the Skynet II projects, these expenditures were to be fully reimbursed by the Air Force under the terms of their May 1, 1972, agreement. *See* Ex. 15, paras. 2, 8.

Section 22 of the Act, 82 Stat. 1323, *as amended* 22 U.S.C. § 2762, similarly provides:

> § 2762. *Procurement for cash sales; necessity for dependable undertaking by foreign country or international organization; availability of appropriations for payment.*
>
> * * * * *
>
> (b) The President may, when he determines it to be in the national interest, accept a dependable undertaking of a foreign country or international organization with respect to any such sale, *to make full payment within 120 days after delivery of the defense articles or the rendering of the defense services. Appropriations available to the Department of Defense may be used to meet the payments required by the contracts* for the procurement of defense articles and defense services and shall be reimbursed by the amounts subsequently received from the country or international organization to whom articles or services are sold. (Emphasis added.)

Under the foregoing provisions,[20] as implemented by the Air Force Space and Missile Systems Organization (SAMSO), all defense supplies and services procured by the U.S. Government in connection with the Skynet II program were to be provided to the U.K. Government on a "dependable undertaking" cash basis (DD Form 1513, Letter of Offer). This condition of sale was in fact clearly indicated on the face of each individual contract, or FMS case, executed by the two Governments. *See* Exhs. 14F–K. Pursuant to this condition, as expressly prescribed by statute, the U.K. was to pay the U.S. Government whatever was finally determined to be the actual cost of articles or services provided in con-

[20] FMSA procedures are further defined and implemented by the following documents, appended to *Defendant's Motion* as Exhibits 14B through E, respectively: (1) Department of Defense (DoD) Instruction No. 2140.1, dated Jan. 29, 1970, entitled "Pricing of Sales of Defense Articles and Defense Services to Foreign Countries and International Organizations;" (2) DoD Directive No. 2140.2, dated Jan. 23, 1974, entitled "Recovery of Nonrecurring Costs Applicable to Foreign Military Sales (FMS);" (3) Air Force Manual (AFM) 177–112, dated March 8, 1972, entitled "International Accounting Transactions;" and (4) AFM 400–3, dated March 7, 1974, entitled "Foreign Military Sales." Among other things, these documents generally recognize that, where foreign military sales are made on a "dependable undertaking" cash basis, regular DoD appropriations are initially to be used for procurement of supplies and services, with the particular appropriation account to be recredited upon receipt of reimbursement from the customer country.

nection with Skynet II, with such payment to be made either in advance or—as in an admittedly significant number of instances—within 120 days after delivery or performance thereof.

Defendant asserted, during oral argument, that under Section K, paras. 4 and 5 of the 1970 MOU, a trust fund was established, consisting of sums deposited quarterly by the U.K. Government and intended to be sufficient to meet all "calls" thereon by the U.S. Government. Whether such "calls" were to be made in advance of or only subsequent to U.S. Skynet II—related expenditures, however, is not articulated in the MOU. In fact, defendant's submissions clearly disclose that this trust fund arrangement was a standard mechanism for effecting Air Force foreign military sales pursuant to §§ 21 and 22 of the FMSA, *supra*. Under this mechanism, sums were to be periodically withdrawn from the particular trust fund account, as administered by the Air Force Accounting and Finance Center (AFAFC), in order to reimburse the appropriate Air Force appropriation account from which FMS expenditures were initially made. As stated at para. 8–2(c) of Air Force Manual 400–3, dated March 7, 1974, and entitled "Foreign Military Sales":

> c. Air Force Reimbursement. *The procurement of most materiel and services for FMS is initially financed by Air Force appropriations.* The consummation of a FMS case provides the Air Force with the obligational authority it requires to furnish the materiel or services involved. The Air Force is repaid upon receipt, by AFAFC, or properly executed Reports of FMS Deliveries and Services Performed * * * or Reports of Progress Payments. * * * The amount of reimbursement to the Air Force will equal the value of these reports, plus appropriate accessorial charges, plus or minus any adjustments from prior billings. *The FMS Central Accounting and Finance Office at AFAFC reimburses the Air Force from Trust Fund Expenditure Account* 57–11X8242 * * *. (Emphasis added.)

Defendant, in effect, admits this much in its brief, wherein it states, quoting from the Affidavit of L. K. Moseman, II, Deputy Assistant Secretary (Logistics), Department of the Air Force, that:

> [T]hese said Skynet II FMS cases were cash sale dependable undertakings * * * signed by the U.S. and U.K. governments, which established the funding authorization and included the applicable two percent Administrative Surcharge. *The USAF subsequently provided the articles and services using "reimbursable budget authorization," and its expenditures and reimbursements were carried out during the four year period through the standard FMS trust fund deposit arrangement. All Air Force funds used were appropriated funds which were reimbursed with U.K. funds. No non-appropriated USAF funds were used at any time.* [*Defendant's Motion*, at 29–30.] (Emphasis added.)[21]

In short, there can be no question that, for purposes of the Skynet II program, regular DoD/AF appropriated funds were intended by Congress to be used, and were so used, in the first instance.

Notwithstanding this fact, defendant argues that the statutory arrangement for full reimbursement by the U.K. of all U.S. costs on the program within 120 days indicates congressional intent to make the program *effectively* self-supporting and that, hence, under our *Interdent* and *Kyer* decisions, this court is without jurisdiction of plaintiff's claim. We cannot agree. As earlier discussed, neither *Interdent* nor *Kyer* involved the use of any appropriated funds. Moreover, certain additional factors may be noted which, in our view, manifest a congressional (and executive) intent with respect to foreign military sales in general, and the Skynet II program in particular, contrary to defendant's position.

First, paragraph 2 (b) (4) under Section K of the 1970 MOU, concerning the calculation of charges, states that "[a] fair share of any non-recurring costs for mutually beneficial research, development and production * * *" shall be borne by the U.K. Government. Such nonrecurring costs are in fact the subject of a detailed DoD Directive, No. 2140–2, dated January 23, 1974, entitled "Recovery of Non-recurring Costs Applicable to Foreign Military Sales

[21] *See also Defendant's Motion*, at 53–54: "Defendant, of course, recognizes that under the Foreign Military Sales Act certain Defense Department appropriated funds can be used (and in the case of the Skynet II program have been used) for a short period of time until reimbursed by the customer country within 120 days after the delivery of items or the rendering of services in connection with 22 U.S.C. § 2761 and § 2762 cash sales."

(FMS). Ex. 14C. The obvious implication of Section K, consistent with other foreign military sales projects covered by the above-mentioned and similar DoD Directives, is that the U.S. Government is also to bear *its* "fair share" of such non-recurring costs out of, in the case of Skynet II, regular (and *non*-reimbursable) DoD/AF appropriations.

Second, paragraphs 2 and 3 under Section I of the 1970 MOU, concerning patent liability (1) require each Government to give the other notice of any pending claims or actions for patent infringement arising from the Skynet II procurement activities of either Government; (2) prohibit settlement of any such action without prior agreement between the two Governments "except under an award by a court of competent jurisdiction;" and (3) provide that "any payments made by one Government in consequence of [any such action] * * * will be repaid by the other Government." It is difficult to imagine language which could more clearly contemplate the Government's potential liability for precisely the sort of infringement suit presently before us. Clearly, the reasonable inference to be derived from this section is that appropriated funds were intended to be available to satisfy judgments rendered in such actions pending ultimate reimbursement by the U.K.

Nor does Section I constitute the only evidence that the Government plainly foresaw, and expressly provided for, the use of appropriated funds in order to satisfy patent infringement judgments rendered as a consequence of its foreign military sales activities. Beginning with the enactment of § 517 of the Mutual Security Act of 1951, 65 Stat. 382, the forerunner of the 1968 FMSA, Congress incorporated into virtually every successor act governing foreign military assistance a special patent infringement jurisdictional provision.[22] *See* Mutual Security Act of 1954, Section 506, 68 Stat. 852; Foreign Assistance Act of 1961, Section 606, 75 Stat. 440, 22 U.S.C. § 2356. The 1951 and 1954 Acts, for example, provided as follows:

[22] Such a provision, however, was omitted, without explanation, from the 1968 FMSA. Defendant argues, on the basis of this omission, that Congress thereby intended to eliminate this court's jurisdiction of patent infringement claims arising in connection with the Government's foreign military sales activities. We disagree with this contention, but defer discussion of it until the final section of this opinion.

Opinion of the Court

(a) As used in this section—

(1) the term "invention" means an invention or discovery covered by a patent issued by the United States; and

* * * * *

(b) Whenever, in connection with the furnishing of any assistance in furtherance of the purposes of this Act—

(1) use within the United States, without authorization by the owner, shall be made of an invention; * * *

* * * * *

the exclusive remedy of the owner of such invention or information shall be by suit against the United States in the Court of Claims or in the District Court of the United States * * * for reasonable and entire compensation for unauthorized use or disclosure. * * *

We had occasion to consider the import of this provision in *Kaplan* v. *United States*, 139 Ct. Cl. 682, 685–87, 153 F. Supp. 787, 788–90 (1957). In that case, plaintiff, the owner of patents on certain sleeping bags, alleged that the bags were, without license, manufactured under contracts with the Government and then " 'packed for overseas shipment and use by friendly nations within the language, meaning, and content of the Mutual Security Acts * * *'." 139 Ct. Cl. at 685. The court rejected plaintiff's claim to the extent that it was based on the Mutual Security Act. However, in interpreting that Act, the court stated that, where a patented article was produced in the United States by or on behalf of a friendly nation under the Mutual Security Program, it was intended that the United States Government would assume responsibility for any patent infringement which resulted from such use. Also, where United States Government officials disclosed any patented information to a foreign country for their use under the program, the United States would be liable. 139 Ct. Cl. at 687.

Two points are worthy of note here. First, it should be observed that the Government in *Kaplan* did not contend, as it has in the instant case, that this court lacked jurisdiction because the Mutual Security Program was effectively self-supporting. We fail to see any significant difference between

the dependable undertaking/reimbursable expenditure arrangement which obtained under the Mutual Security Acts and that which was used for the Skynet II program under the 1968 FMSA.[23] The second and more critical point to be noted is that, under the *Kaplan* court's interpretation of the Mutual Security Act, it is clear that Congress—throughout nearly two decades of experience with U.S. military assistance abroad—consistently foresaw, and attempted by express statutory provisions to avert, the threat of injunctive interruption of such assistance by patent infringement suits brought against the Government in the district courts. Thus, we find it difficult to entertain the notion that Congress, in so acting, also and simultaneously believed the Government to be immune from suit in connection with such foreign military assistance activities on the ground that any U.S. expenditures thereunder were to be shortly reimbursed by the foreign governments concerned.

In *Breitbeck* v. *United States*, 205 Ct. Cl. 208, 212–13, 500 F. 2d 556, 558 (1974), a case which we find more closely apposite to the instant case than either *Kyer* or *Interdent*, *supra*, the Government also contended that this court lacked jurisdiction because the agency there involved, the Saint Lawrence Seaway Development Corporation, was purportedly intended by Congress to be financially self-sufficient. In rejecting the Government's contention, and holding that the court had jurisdiction under 28 U.S.C. § 1491 to determine an employee's claim for wages against that corporation, the court observed that "[b]y these provisions [establishing the agency] Congress did attempt to make the agency self-

[23] The legislative history of the 1968 FMSA, 22 U.S.C. §§ 2751–94, indicates that §§ 21 and 22 thereof, 22 U.S.C. §§ 2761 and 2762, which specifically authorize the dependable undertaking/reimbursable expenditure arrangement used for Skynet II, were substantial repetitions of §§ 507(a) and (b) of the 1961 Foreign Assistance Act, Pub. L. No. 87–195, Pt. II, § 507, 75 Stat. 437, with the exception that the 1961 sections authorized up to 3 years, rather than only 120 days, for foreign country reimbursement. *See* S. Rep. No. 1632, 90th Cong., 2d Sess. 3, 1968 U.S. Code Cong. & Admin. News 4476. Sections 507(a) and (b) of the 1961 Act were, in turn, derived—with changes not pertinent here—from § 106 of the Mutual Security Act of 1954, 68 Stat. 836; § 707 (b) and (c) of the Mutual Security Act of 1953, 67 Stat. 160; § 8(b) of the Mutual Security Act of 1952, 66 Stat. 149; § 506 of the Mutual Security Act of 1951, 65 Stat. 379; and § 408(e) of the Mutual Defense Assistance Act of 1949, 63 Stat. 720, respectively.

supporting, in general, *in the long run, but there are likewise substantial indications that this was not to separate it wholly from the Treasury.*" 205 Ct. Cl. at 212, 500 F. 2d at 558. (Emphasis added.) Instead, the court pointed to various factors which demonstrated the agency's status as an appropriated fund activity, including (1) that its activities were partially financed by long-term revenue bonds which Treasury was required by statute to purchase out of designated Treasury funds; (2) that employee retirement annuities were paid from Treasury moneys, and (3) that it was required to contribute its proportionate share to the civil service retirement and disability fund. As a consequence of such factors, the court concluded that "[t]here is, in short, no such clear cleavage between the corporation's own funds and those of the United States that one can say that Congress wished to cut the agency entirely loose from the Treasury or from appropriated funds." 205 Ct. Cl. at 212–13, 500 F. 2d at 558.

In the instant case, as in *Breitbeck*, we find no indication that Congress "wished to cut the Skynet II program entirely loose from the Treasury or from appropriated funds." On the contrary, we have found, here even more clearly than in *Breitbeck*, that Skynet II was directly dependent upon and designed to be dependent upon appropriated funds. While the court, in *Breitbeck*, recognized that Congress intended the Saint Lawrence Seaway Development Corporation to become financially self-supporting "in the long run," it did not regard this long-term objective as jurisdictionally disabling. Unlike *Kyer*, *supra*, and similar cases involving non-appropriated fund instrumentalities, the agency in *Breitbeck*, as the court found, *was presently dependent upon appropriated funds.*

For purposes of the jurisdictional bar of 28 U.S.C. § 2517, we find no material distinction between *Breitbeck* and the instant case. In both cases, there is no question that regular appropriated funds were required to be used in the first instance. In both cases, there is no question that Congress had specifically given its sanction and support for the agency or program concerned. In short, there exists in neither case any risk of violating the fundamental policy underlying

§ 2517 by imposing an unauthorized burden on the public treasury. *Interdent* v. *United States*, *supra*, 203 Ct. Cl. at 298–99, 488 F. 2d at 1012–13; *Kyer* v. *United States*, *supra*, 177 Ct. Cl. at 751–52, 369 F. 2d at 718.

V

22 U.S.C. §§ 2751–94: The 1968 Foreign Military Sales Act

Defendant's final contention is that the omission from the 1968 FMSA of the special patent infringement jurisdictional provision contained in predecessor acts manifests congressional intent to eliminate this court's jurisdiction of such claims arising from the Government's foreign military sales activities. We disagree.

The provision at issue, which most recently appeared as § 606 of the Foreign Assistance Act of 1961, Pub. L. 87–195, Pt. III, § 606, 75 Stat. 440, 22 U.S.C. § 2356, reads in pertinent part as follows:

> (a) Whenever in connection with the furnishing of assistance under this Act—
>
> (1) an invention or discovery covered by a patent issued by the United States Government is practiced within the United States without the authorization of the owner, * * *
>
> * * * * * *
>
> the exclusive remedy of the owner, * * * is to sue the United States Government for reasonable and entire compensation for such practice or disclosure in the district court of the United States * * *, or in the Court of Claims * * *.

This provision had earlier appeared, in substantially identical form, as § 506 of the Mutual Security Act of 1954, 68 Stat. 852, and, originally, as § 517 of the Mutual Security Act of 1951, 65 Stat. 382. *See Kaplan* v. *United States*, *supra*, 139 Ct. Cl. at 685–87, 153 F. Supp. at 788–90. As explained by the Senate Foreign Relations Committee with reference to the 1961 Act:

> This section [606] is a rewrite and simplication, without substantial change, of a provision which has

been in the law for many years as section 506 of the Mutual Security Act [of 1954]. It is designed to meet those cases in which patents or information protected by proprietary rights are disclosed by the U.S. Government in connection with furnishing assistance under the bill [S. 1983].

In such cases, the aggrieved party may sue the United States either in the Federal court in the district where he resides or in the Court of Claims within a period of 6 years. Provision is also made in subsection (b) for out of court settlements.

S. Rep. No. 612, 87th Cong., 1st Sess. 30 (1961), 1961 U.S. Code Cong. & Admin. News 2501. *See also* H. Rep. No. 851, 87th Cong., 1st Sess. 66–67 (1961).

The purpose for this jurisdictional provision, as successively reenacted, was explained in the House Report accompanying its original enactment in 1951, as follows:

> * * * In effect, the section (517 of the 1951 Act) makes applicable to patents and know-how used in the Mutual Security Program long established principles applicable to privately owned patents used by the United States Government.
>
> This section also affects the use of patents without prior authorization by the owner. *At present, by the Act of June 25, 1910 [28 U.S.C. § 1498], a remedy is provided for a patentee against the United States in the Court of Claims when a patented invention is used for manufacture "by or for the United States." It is important to remove any question as to the availability of this remedy in cases of infringements of United States patents in production for foreign governments. Otherwise, it might be possible for essential production to be stopped by injunction by an unsatisfied inventor.* This section makes it clear that this remedy would be available only so long as the activities concerned form a part of the Mutual Security Program.
>
> * * * * *
>
> Capt. George N. Robillard, Assistant Chief of Naval Research for Patents and patent counsel for the Navy, and Mr. Casper W. Ooms, consultant to the Secretary of Defense on patent matters, both strongly emphasized the importance of these provisions in supplying our alies with the materials so vital to the effectiveness of this program. It is the desire of the committee that no technicali-

> ties be permitted to stop the flow of such materials. (Emphasis added.)

H. Rep. No. 872, 82d Cong., 1st Sess. 57 (1951). *See also* H. Rep. No. 1925, 83d Cong., 2d Sess. 95 (1954).

Captain Robillard, identified in the House Report, *supra*, had testified concerning the patent jurisdictional provision that the "Department of Defense considers it essential that such jurisdiction be vested in the Court of Claims, in order to assure an uninterrupted flow of materials for the purpose of military assistance," because in "many instances, materials for our allies will not be purchased directly by the United States and in the absence of this legislation, a patent owner could enjoin a manufacturer from supplying the materials if patent infringement exists." *Hearings on H.R. 5020 and H.R. 5113 Before the House Committee on Foreign Affairs*, 82d Cong., 1st Sess., at 1420 (1951). Mr. Ooms, also identified in the House Report, had similarly testified that:

> in view of the fact that the bill before you provides for assistance to other nations, which may involve procurement directly by them or for them, using United States Government funds, the question immediately arises whether such procurement and the manufacture pursuant thereto, is subject to the normal patent remedies or is subject to the special provisions which have long been effective with respect to manufacture which can be more directly identified with the United States. This section eliminates any such question and merely classifies the activities which this legislation contemplates with manufacture by or for the United States. [*Id.* at 1406.]

The 1968 FMSA contains no patent infringement jurisdictional provision corresponding to § 606 of the 1961 Act. Nor was any reference made to patent rights and Government liability in connection with foreign military sales during the hearings on the Senate version of the act, *Hearings on S. 3092 Before the Senate Committee on Foreign Relations*, 90th Cong., 2d Sess. (1968), or during debate on H.R. 15681 in the House, 114 Cong. Rec. 26214–26320 (1968), and in the Senate. 114 Cong. Rec. 30403–30404 (1968). Section 45 of the FMSA, 82 Stat. 1327–28, 22 U.S.C. § 2751 n., entitled "*Statutes Repealed and Amended*," makes no mention of

§ 606 of the 1961 Foreign Assistance Act,[24] 22 U.S.C. § 2356, but provides in pertinent part that:

> (c) * * * Except for the laws specified in section 44 [i.e., the 1954 Atomic Energy Act, and 10 U.S.C. § 7307, relating to the lending of naval vessels to foreign countries], *no other provision of law shall be deemed to apply to this Act unless it refers specifically to this Act or refers generally to sales of defense articles and defense services under any Act.* (Emphasis added.)

Defendant argues, on the basis of this language that, although the patent infringement jurisdictional section (606) of the 1961 Act was not expressly repealed, Congress intended, by omitting that section from the 1968 FMSA, to render it inapplicable to foreign military sales. This is so, according to defendant, because § 606 does not (as § 45(c) of the FMSA would require) "refer generally to sales of defense articles and defense services," but, instead, refers only to "the furnishing of assistance under this Act" which, in its presently amended form (i.e., after extraction of its sales provisions and their incorporation into the separate FMSA), no longer includes the sales program.

This argument misses the mark inasmuch as it incorrectly assumes that § 606 was qualified and limited by the terms and context of the 1968 Foreign Assistance Act (FAA), 82 Stat. 960–67, *as amended* 22 U.S.C. §§ 2151–2443. This is simply not the case. The 1968 FAA was not intended to wholly supersede the 1961 Act. As the Senate Report makes clear, the purpose of the 1968 FAA was merely to amend and repeal respective provisions of the 1961 Act and to add certain new provisions thereto. S. Rep. No. 1479, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Admin. News 3957–59. Nor is § 606 even mentioned in the 1968 FAA or in the legislative history accompanying it. While it is true, as defendant indicates, that the foreign military sales provisions were extracted from the 1961 Act (and consolidated and reenacted as the 1968 FMSA), this change did not alter the original meaning and intent of those provisions of the 1961 Act which, like § 606, were neither amended nor repealed by the 1968 FAA (or the

[24] Sections 45(a) and (b) do, however, expressly repeal §§ 521, 522, 523, 524(b)(3), 634(g) and 640 of the 1961 Act, and amend §§ 622(b), 622(c), 634(d), and 644(m) of that Act, respectively.

1968 FMSA). On the contrary, § 606 was codified as 22 U.S.C. § 2356 (1970), and has since remained in full force and effect. Indeed, the note following the text of § 2356 indicates quite clearly that Congress intended that section to have the same meaning and scope it possessed as originally enacted in 1961. The note states that " '[t]his chapter', referred to in the text, was in the original 'this Act', meaning Pub. L. 87–195 [the 1961 Foreign Assistance Act]." Since the 1961 Act makes § 606 applicable to, *inter alia*, foreign military sales, it follows that 22 U.S.C. § 2356 remains so applicable, and therefore satisfies the prerequisite to applicability imposed by § 45(c) of the 1968 FMSA.

Moreover, defendant's argument also ignores the critical fact, amply documented in the legislative history, that § 606 and its predecessor provisions were, from their very inception in 1951, inextricably connected with the gradually expanding foreign military sales program. In view of this fact, it is simply inconceivable to us that Congress, by omitting to expressly incorporate that provision into the 1968 FMSA, thereby intended to render that provision applicable only to non-sale varieties of foreign assistance. Such a wholesale change in the purpose which that provision had served for the preceding two decades would, at the very least, have been mentioned or explained. It follows, *a fortiori*, that more than silence would be required had Congress also intended, by such omission, to narrow the scope of this court's jurisdiction under 28 U.S.C. § 1498(a). We therefore conclude that this court's § 1498(a) jurisdiction is not barred as to claims properly arising from the Government's foreign military sales activities.

VI

Conclusion

For the foregoing reasons, we hold that this court has jurisdiction of plaintiff's claim pursuant to 28 U.S.C. § 1498(a). Accordingly, it is ordered that defendant's motion for partial summary judgment is denied, and the case is remanded to the Trial Division for disposition of the remaining issues of fact and law in accordance with this opinion.

Syllabus

533 F. 2d 538

JOSEPH H. JANKOWITZ v. THE UNITED STATES

[No. 83–75. Decided April 14, 1976]

ON PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS AND ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Civilian pay; claim for back pay; suspension from duty; acquittal of criminal charges; False Claims Act; counterclaims; limitation of actions.—Plaintiff, an appraiser with the Federal Housing Administration, was indicted by a Federal grand jury on charges of having received illegal payments to influence his official actions relating to FHA mortgage insurance applications. On March 31, 1972 plaintiff was noticed of proposed indefinite suspension without pay during pendency of the criminal action, and on April 6, 1972 the suspension was imposed, this action being approved by the Civil Service Commission Regional Office and affirmed by the Board of Appeals and Review. On June 18, 1974 plaintiff was acquitted of all charges; on June 19, 1974 he reported for duty, requesting reinstatement; and on November 5, 1974 he returned to duty. Defendant concedes that plaintiff is entitled to judgment for the period June 19–November 5, 1974, for which period he has not been paid. Since plaintiff has also not been paid for the period of suspension between April 6, 1972 and June 19, 1974, he seeks to recover back pay for this period. In its first counterclaim, defendant seeks damages, plus statutory forfeitures, pursuant to the False Claims Act, 31 U.S.C. § 231, *et seq.*, in its second counterclaim defendant seeks to recover the alleged illegal payments, and by way of affirmative defense defendant seeks to set off damages for deceit against any amounts which may be determined to be due plaintiff. Plaintiff has moved for summary judgment on his back pay claim, and to dismiss defendant's counterclaims and affirmative defense on the ground that they are barred by applicable statutes of limitations. It is *held* (1) that plaintiff is only entitled to back pay for the period June 19–November 5, 1974, and to this extent his motion for summary judgment is allowed; (2) that plaintiff's suspension without pay was neither unjustified nor unwarranted, and he is not entitled to recover for that period; (3) that, respecting the first counterclaim, defendant's cause of action did not accrue at the time of the alleged illegal payments to plaintiff but accrued at the earliest at the time of the obligor's default upon the insured indebtedness, which event occurred less than 6 years prior to the filing of the counterclaim; (4) that plaintiff's motion to dismiss the affirmative defense must fail in view of 28 U.S.C. § 2415(f); and (5) that the limitations period was tolled with respect to the second counterclaim and accordingly the latter is not barred. The parties' motions are granted and denied consonant

Syllabus

with the foregoing. Judgment for plaintiff is subject to the counterclaims and the affirmative defense, and the case is remanded to the trial judge for further proceedings.

Pleading and practice; motion for summary judgment.

[1] A party moving for summary judgment has the burden of demonstrating entitlement to judgment as a matter of law. (Rule 101(d).)

Federal Civil Procedure ⇐ 2544

Civilian pay; adverse personnel action; charges not sustained in criminal prosecution.

[2] Normally, acquittal of a criminal charge does not lead inexorably to the conclusion that an adverse personnel action was unjustified or unwarranted, where based upon the same alleged conduct, because different standards of proof prevail in criminal prosecutions and adverse personnel actions. Here, after giving plaintiff advance notice of proposed indefinite suspension conforming to the sample set out in the Federal Personnel Manual, it was proper for the agency to predicate plaintiff's indefinite suspension from his job without pay solely upon the fact of indictment, thus affording plaintiff a chance to save his job if exonerated.

United States ⇐ 36

Civilian pay; claim for back pay; suspension without pay; charges not sustained in criminal prosecution.

[3] Having determined that the agency followed all applicable procedural recommendations and safeguards of the Federal Personnel Manual in justifiably suspending plaintiff indefinitely without pay during pendency of criminal proceedings, plaintiff is not entitled to back pay for the period from his indefinite suspension to the date when he reported for duty and requested reinstatement following his acquittal of all criminal charges.

United States ⇐ 39(8)

Counterclaims; Court of Claims jurisdiction; False Claims Act.

[4] Under 28 U.S.C. § 1503, the Court of Claims has subject matter jurisdiction over a counterclaim by the Government based on the False Claims Act, 31 U.S.C. § 231 *et seq.*

Courts ⇐ 450

Fraud against the United States; False Claims Act; limitation of actions; accrual of cause of action; commission of act; what constitutes "act."

[5] The "act" from which the False Claim Act statute of limitations commences to run against one who allegedly took illegal payments to influence his official action in rendering inflated appraisals relating to FHA mortgage insurance applications, for purposes of this case is, at the earliest, the obligor's default upon the insured indebtedness, since it is at this time that it can be said with relative certainty that a false claim will be forthcoming.

Courts ⇐ 461(4)

Syllabus

Setoff or offset; Government right of

[6] Since 28 U.S.C. § 2415(f) provides that a time-barred claim of the United States may be asserted by way of offset and may be allowed in an amount not to exceed the amount of any recovery available to plaintiff, defendant's defense of setoff charging plaintiff with deceit relating to alleged conduct not germane to plaintiff's main action for back pay is properly assertable against plaintiff.

United States ⇐ 130(4)

Counterclaims; Court of Claims jurisdiction; scope of relief.

[7] A Government counterclaim against plaintiff seeking back pay to recover the amount of illegal payments allegedly made to plaintiff to influence his official action in inflating appraisals relating to FHA mortgage insurance applications is within this court's jurisdiction under 28 U.S.C. § 1503. The intent of Sec. 1503 is to permit the Government to have all controversies between it and a plaintiff litigated in one forum once and for all.

Courts ⇐ 450

Counterclaims; payment illegally received as agent of Government.

[8] The obligation of an agent of the Government to account to the latter for any payment illegally received, since premised upon an obligation created by law, and not upon the apparent mutual consent of the parties, derives from a contract implied in law within the meaning of 28 U.S.C. § 2415(a), and recovery by the United States by way of counterclaim under 28 U.S.C. § 1503 on this sort of implied contract is not barred.

Courts ⇐ 450

Pleading and practice; summary judgment; response to motion for summary judgment.

[9] To controvert assertions of fact contained in an affidavit filed in support of a motion for summary judgment, or in opposition thereto, the party involved may not rely upon bare denials but must adduce by affidavit or otherwise evidence tending to place the disputed matter genuinely in issue.

Federal Civil Procedure ⇐ 2546

Counterclaims; limitation of actions; accrual of cause of action; tolling of statute; payment illegally received as agent of Government.

[10] Where the Government has counterclaimed to recover the amount of illegal payments allegedly made to plaintiff to inflate appraisals relating to FHA mortgage insurance applications, on the basis of the record evidence the running of the limitations period set down in 28 U.S.C. § 2415(a) was tolled under 28 U.S.C. § 2416(c) until the time when the facts first became known to responsible officials charged with investigation of the alleged payments.

Courts ⇐ 461(3)

Herbert A. Levy, attorney of record, for plaintiff. *Allen Lashley*, of counsel.

Leslie H. Wiesenfelder, with whom was *Assistant Attorney General Rex E. Lee*, for defendant. *Alexander Younger*, of counsel.

Before SKELTON, NICHOLS, and BENNETT, *Judges*.

BENNETT, *Judge*, delivered the opinion of the court:

In this civilian pay case plaintiff sues under the Back Pay Act of 1966, 80 Stat. 94, 95, 5 U.S.C. § 5596 (1970), and 28 U.S.C. § 1491 (1970), seeking pay and allowances which he would have earned had he not been made the object of an adverse personnel action.[1] Defendant has lodged in its responsive pleading an affirmative defense of setoff of damages for "deceit," as the alternative to its first counterclaim, under the False Claims Act, 31 U.S.C. § 231 *et seq.* (1970), as well as a second counterclaim for return of alleged bribes, gratuities, kickbacks, and similar illegal payments to plaintiff. Defendant invokes our jurisdiction of its counterclaims pursuant to 28 U.S.C. § 1503 (1970).

At all relevant times prior to March 28, 1972, plaintiff was employed as an appraiser, GS–11, step 7, $15,973 per annum, in the Federal Housing Administration (FHA), Department of Housing and Urban Development (HUD), at a location in the State of New York. On that date he was indicted by a grand jury in the United States District Court for the Eastern District of New York. The indictment charged plaintiff with having received two separate illegal payments of $100 each in return for being influenced in his official acts as an appraiser in connection with the premises known as 260 51st Street, Brooklyn, New York.

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[1] 5 U.S.C. § 5596(b) (1970) provides, in pertinent part:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority * * * to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

"(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned * * * if the personnel action had not occurred, less any amounts earned by him through other employment during that period; * * *."

Opinion of the Court

On March 31, 1972, plaintiff's employer transmitted to him an advance notice of proposed indefinite suspension without pay during the pendency of the criminal action. The reason cited for this action was: "You were indicted by the Federal Grand Jury for the United States District Court, Eastern District of New York, on or about March 28, 1972 * * * for accepting bribes." Plaintiff made a written reply on April 3, 1972, but it was ineffective and indefinite suspension without pay was imposed on April 6, 1972. After a hearing was conducted on June 1, 1972, the New York Regional Office of the Civil Service Commission, by order dated July 5, 1972, approved both the substantive and procedural aspects of plaintiff's suspension. That office recognized in its decision that the suspension was based upon the fact of plaintiff's indictment, and not upon any separate administrative charge to the effect that plaintiff was actually guilty of the bribery as alleged by the grand jury. The Civil Service Commission's Board of Appeals and Review affirmed on November 13, 1972.

Just over 1 month prior to final Civil Service Commission action on his administrative appeal, on October 1, 1972, plaintiff went on trial in the Eastern District of New York. The trial involved 23 defendants charged on 211 separate counts, and lasted from October 1, 1973, to June 18, 1974, ending in plaintiff's acquittal of all charges by a jury verdict and judgment entered June 18, 1974. Plaintiff conceded at argument that during the entirety of the trial he was unavailable for the performance of his job.

On June 19, 1974, plaintiff reported to his employer for duty and requested reinstatement. By notification of personnel action dated December 13, 1974, plaintiff was officially returned to duty, effective retroactively to June 19, 1974, at a salary commensurate to GS–11, step 7. Plaintiff has never been paid for the period between June 19, 1974, when he presented himself for duty, and the date he actually returned to work, November 5, 1974. Defendant concedes plaintiff's entitlement to judgment for this period only. For the period of indefinite suspension without pay between April 6, 1972, and June 19, 1974, plaintiff was not paid and claims it here. Effective February 20, 1975, plaintiff retired from the service for disability and he brought this suit on March 24, 1975.

Relative to defendant's affirmative defense and counterclaims certain additional facts must be taken into account. The alleged illegal payments to plaintiff are said to have been made on or about October 31, 1968, and January 30, 1969. Defendant avers that in return for such illegal payments plaintiff intentionally inflated his appraisal of the land and improvements at 260 51st Street, Brooklyn, New York, from $16,150 to $23,850. Plaintiff admits only increasing the appraisal. Defendant says further that FHA insured against default upon indebtedness secured by this property in an excessive amount reflecting plaintiff's inflated appraisal. Such default did occur, so far as the application for insurance benefits indicates, not earlier than January 1970. Thereafter, insurance benefits out of proportion to the reasonable value of the collateral were paid and the Secretary of HUD acquired title to the property as well as an assignment of the paper embodying the defaulting party's obligations to the mortgagee/assignor. The application for such insurance benefits, dated February 15, 1973, was presented to FHA on February 22. Defendant's counterclaims were filed on May 23, 1975. Therefore, between the date of the alleged illegal payments and the filing of these counterclaims there expired a period in excess of 6 years. Between the date of the obligor's default and the filing of the counterclaim, 5 years and nearly 5 months elapsed. Between the filing of the claim for FHA insurance benefits and the filing of the instant counterclaims, only 2 years and 3 months went by. Finally, defendant has provided an affidavit tending to prove that not until March 1970 were facts reasonably known to FBI investigators leading to discovery of plaintiff's alleged bribery.

Plaintiff now moves for summary judgment on his back pay claim and to dismiss the affirmative defense and counterclaims, on the ground that they are barred by applicable statutes of limitations. All other of plaintiff's arguments touching defendant's counterclaims have been abandoned. Defendant cross-moves for summary judgment as to plaintiff's back pay claim, and opposes plaintiff's bid for dismissal of both counterclaims. For the reasons stated below, we think that plaintiff's motion should be allowed insofar as it seeks summary judgment for back pay, but only for

the period between June 19, 1974, and his actual return to work, as defendant has conceded. We have concluded, further, that the defendant's affirmative defense and counterclaims are not barred by applicable statutes of limitations. Accordingly, to this extent plaintiff's motion should be denied.

I

Plaintiff as moving party encounters the burden of demonstrating his entitlement to summary judgment for back pay as a matter of law. Rule 101(d); *e.g.*, *Housing Corp. of America* v. *United States*, 199 Ct. Cl. 705, 710, 468 F. 2d 922, 924 (1972). As we have seen, the Back Pay Act of 1966 authorizes us to make such an award only where it appears that the plaintiff has undergone "an unjustified or unwarranted personnel action." [2] In accordance with statutory authority conferred by 5 U.S.C. § 5596(c) (1970), the Civil Service Commission heretofore has adopted regulations interpreting this statutory language:

> (d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action. [5 C.F.R. § 550.803(d) (1975).]

Within this framework the moving party here must particularize for us the way in which his indefinite suspension from duty without pay was unjustified or unwarranted.

Plaintiff relies principally upon the position that his suspension from duty without pay was unjustified and unwarranted because procedurally defective. He calls our attention to the undisputed fact, previously mentioned, that his advance notice of proposed indefinite suspension cited his *indictment* as its basis; not the acts underlying the indictment—alleged bribery. Since the personnel action was bottomed upon the indictment itself, and not upon the alleged criminal acts, plaintiff presses upon us the view that his acquittal in effect retroactively destroyed the legal efficacy of his indictment as a basis for adverse personnel action. At first blush this notion seems extravagant indeed; we have

[2] *See* note 1, *supra*.

held on many occasions that in the normal case acquittal of a criminal charge does not lead inexorably to the conclusion that an adverse personnel action was unjustified or unwarranted, where based upon the same alleged conduct. *E.g.*, *Holman* v. *United States*, 181 Ct. Cl. 1, 383 F. 2d 411 (1967); *Prater* v. *United States*, 172 Ct. Cl. 608 (1965); *Finn* v. *United States*, 152 Ct. Cl. 1 (1961); *Bryant* v. *United States*, 122 Ct. Cl. 460 (1952), *cert. denied*, 344 U.S. 913 (1953); *Croghan* v. *United States*, 116 Ct. Cl. 577, 89 F. Supp. 1002, *cert. denied*, 340 U.S. 854 (1950). We have approved the principle just stated because of the different standards of proof prevailing in criminal prosecutions and adverse personnel actions.

Plaintiff believes the instant case to be different, however, in that the indictment itself was offered as the reason for proposed indefinite suspension. He has referred us to certain provisions in the Federal Personnel Manual (FPM) to support his contention that acquittal vitiated the cause for action against him.

> S3–2 INSUFFICIENT CAUSE
>
> a. *Pitfalls to avoid.* Agencies should be alert to avoid such errors as the following:
>
> * * * * *
>
> (2) *Cause based on criminal indictment.* Except when the agency suspends an employee indefinitely pending disposition of a criminal action, the agency should not base an adverse action on a criminal indictment or conviction. Instead, the agency should base the action on what the employee did that was wrong. If the cause relied on is a criminal indictment * * *, then a subsequent acquittal of the employee * * * would, in effect, vacate the cause for action. However, if the cause relied on is the employee's acts of wrongdoing, generally the administrative action will not be affected by the subsequent court action on the criminal case. [FPM Supp. 752–1, S3–2a(2) (1972).]

Much the same language is repeated in FPM Supp. 752–1, S7–1c(2) (1972), located in subchapter S7, Notice of Decision. We think plaintiff's mistake resides in taking the wording of these provisions at face value, neglecting to consider whether they really apply to the facts of his case. Defendant

in contending that we should not deem ourselves bound by the FPM, since that publication does not arise to the dignity of regulations having the force and effect of law, also appears not to have faced the question of whether the quoted language applies here. There is no need to decide whether such FPM provisions are regulations binding upon the agency in the sense understood by the Supreme Court in *Service* v. *Dulles*, 354 U.S. 363 (1957).[3] In our judgment the employing agency complied with all guidelines of the FPM which do apply, and the passages cited by plaintiff have no bearing upon the facts of the instant case.

It will be noticed upon examination of the language in FPM Supp. 752–1, S3–2a(2), *supra*, that an agency "should not base an adverse action on a criminal indictment or conviction," "[*e*]*xcept when the agency suspends an employee indefinitely pending disposition of a criminal action.*" [Emphasis supplied.] Since plaintiff's employer here *did* suspend him indefinitely during the pendency of the criminal case, the general rule of S3–2a(2) simply had no application. Thus, it was entirely proper to predicate such indefinite suspension solely upon the fact of indictment. As the advance notice itself states, HUD reserved the right to institute a *second* adverse action, looking toward removal, should the facts disclosed by investigation have warranted that step. Moreover, we think this procedure to have been eminently fair to plaintiff. Recognizing that he might well be acquitted, the agency even-handedly rejected the "knee-jerk" approach, giving plaintiff a chance to save his job if exonerated.

Our conclusion in this regard is fortified by reference to other passages in FPM Supp. 752–1, upon which the employing agency obviously relied, but to which we have not been referred by the parties. FPM Supp. 752–1 S5–3b (1972) provides, in part:

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[3] So far as our research discloses, this question remains open to the most serious judicial doubt. *See Piccone* v. *United States*, 186 Ct. Cl. 752, 762 n. 12, 407 F. 2d 866, 871–72 n. 12 (1969). Judge Nichol's concurring opinion in *Piccone* is most instructive on this point. 186 Ct. Cl. at 770 *et seq.*, 407 F. 2d at 876 *et seq. See also Manzi* v. *United States*, 198 Ct. Cl. 489 (1972); *Nordstrom* v. *United States*, 169 Ct. Cl. 632, 638, 342 F. 2d 55, 59 (1965); *Brennan* v. *Ace Hardware Corp.*, 495 F. 2d 368, 376 (8th Cir. 1974).

b. "*Crime*" *provision.* (1) When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the agency may give the employee less than 30 days' advance written notice. * * *.[4]

* * * * *

(3) * * * [A] difficulty in applying the crime provision is to determine what constitutes reasonable cause for believing that an employee is guilty. An agency cannot invoke the "crime" provision solely on evidence that the employee was arrested. However, if the agency has evidence that the employee * * * was indicted by a grand jury, then the agency would have reasonable cause for believing the employee guilty of the crime (see sample notice B–7). * * *.[5]

In S5–4, Duty Status During Notice Period, the following provisions appear:

c. Emergency situations under subpart B. * * *.

(2) *Use of "crime" provision.* When an agency believes an employee should not remain on the premises and can invoke the crime provision, it is better practice to shorten the notice period and process only one action—a removal or an indefinite suspension * * *. Generally, to invoke the crime provision and process a removal or indefinite suspension with a curtailed notice period an agency would:

—Notify the employee he is being put immediately in a nonduty status with pay for no longer than five calendar days.

—Give the employee notice * * * of * * * proposed indefinite suspension pending disposition of the criminal action * * *.

* * * * *

If the agency decides to suspend the employee and later, after the resolution of the criminal charges decides to remove him, it must initiate a new adverse action to remove the employee. * * *.

In our estimation, plaintiff's employer followed the FPM scrupulously, including adopting an advance notice of proposed indefinite suspension almost identical to that set out as an example in FPM Supp. 752–1, sample form B–7. Since we

[4] This language reflects the wording of 5 U.S.C. § 7512(b)(1) (1970) and 5 C.F.R. § 752.202(c)(2) (1972).

[5] The advance notice received by plaintiff in this case is practically identical to the one recommended and set out in the FPM at sample notice B–7.

find that the Government in fact followed all applicable procedural recommendations and safeguards in the FPM, we do not agree that plaintiff's indefinite suspension without pay was either unjustified or unwarranted. This much of plaintiff's claim for back pay must fail. However, in accord with the Government's concession, plaintiff is entitled to a judgment for back pay between the official date of his reinstatement, June 19, 1974, and the date of his actual return to work later in that year. To this extent only plaintiff's motion for summary judgment will be allowed.

II

As noted, the Government has asserted a counterclaim under the False Claims Act, 31 U.S.C. § 231 *et seq.*[6] Plaintiff replies that this approach may not be considered on the merits, since any rights appurtaining to the Government under that Act are time-barred by the applicable statute of limitations, 31 U.S.C. § 235 (1970):

> Every suit shall be commenced within 6 years from the commission of the act, and not afterward.

Defendant's theory of liability is that in taking illegal payments and rendering an inflated appraisal, plaintiff knowingly caused a false, fictitious, or fraudulent claim to be made upon or against the United States within the meaning of 31 U.S.C. § 231 (1970). In defendant's view, the "act" which accrues a cause of action is the filing of the application for FHA insurance benefits by the mortgagee. Since this document was filed on February 22, 1973, and the counterclaim interposed here on May 23, 1975, defendant asserts that its claim is not barred. Plaintiff responds by maintain-

[6] 31 U.S.C. § 231 (1970) provides in part:

"Any person * * * who shall * * * cause to be made * * * or cause to be presented * * *, for payment * * * any claim upon or against the Government * * * knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of * * * aiding to obtain the payment or approval of such claim, makes * * * any false * * * certificate * * * knowing the same to contain any fraudulent or fictitious statement or entry * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act * * *."

This court has subject matter jurisdiction of the counterclaim under 28 U.S.C. § 1503 (1970). *Brown* v. *United States*, 207 Ct. Cl. 768, 785, 524 F. 2d 693, 703 (1975).

ing that the "act" is not the filing of the claim, but that the term has reference to the alleged conduct of the person ultimately causing such a claim to be served upon the Government. As plaintiff would have it, therefore, the cause of action accrued to the Government, if at all, at the time of the alleged illegal payments. It has been observed heretofore that more than 6 years elapsed between the date of alleged bribery and the filing of the counterclaim. This dispute requires us to examine the meaning of the term "act" as used in 31 U.S.C. § 235. Whatever its meaning, this event precipitates immediate accrual of the Government's cause of action enumerated in section 231, requiring the claim to be filed within 6 years thereof.

The authorities relevant to this question seem to fall into three categories: (1) cases holding that the "act" does not occur until actual filing of a claim against the Government; (2) a decision stating that the cause of action does not accrue until the insured loan goes into default; and (3) a single opinion suggesting that a right of action under the False Claims Act does accrue, as plaintiff contends, upon the completion of the acts of the person sued, where such acts ultimately cause another to file a false, fraudulent, or fictitious claim against the Government. As to categories (1) and (2), in the case at bar, both the filing of the claim for insurance benefits and the default upon insured indebtedness occurred within 6 years next preceding the filing of defendant's counterclaims. We need decide only whether the phrase "commission of the act," as used in 31 U.S.C. § 235 (1970) and as applied to this case, requires the conclusion that defendant's False Claims Act rights accrued if at all when the plaintiff allegedly received the illegal payments. If so, the counterclaim is barred; if not, it must be remanded for trial.

Decisions indicating that the "act" for purposes of this statute is the actual filing of a false, fictitious, or fraudulent claim (presumably notwithstanding the earlier acts of another which cause such a claim to be filed) include *United States* v. *Ekelman & Assoc., Inc.*, 532 F. 2d 545 (6th Cir., 1976), *United States* v. *Ridglea State Bank*, 357 F. 2d 495 (5th Cir. 1966), *United States* v. *Howell*, 318 F. 2d 162 (9th Cir. 1963), *United States* v. *Ueber*, 299 F. 2d 310 (6th Cir.

1962), and *United States* v. *Globe Remodeling Co.*, 196 F. Supp. 652 (D. Vt. 1960) (supp. opin. 1961 at 657).[7] For our purposes we need refer only to the last of these five. In *Globe Remodeling Co.* the court said:

> The claim of a lending institution for payment on the guaranty obligation by the Federal Housing Administration is a false claim for the purposes of the False Claims Act when the guaranty obligation was induced by one or more false statements in a credit application or completion certificate. [Citation omitted.] The statute of limitations * * * for causing such a false claim to be presented for payment, commences when the claim for payment on the guaranty obligation is presented * * *. [196 F. Supp. at 655.]

This line of decisions has the aspect of certainty in application to commend it. Yet it may be difficult to accede to the idea that a claim filed by a third party (in our case the FHA mortgage insurance beneficiary) is an "act" of a defendant whose conduct made the submission of the claim possible.

The second group of these authorities, looking to the default upon insured indebtedness rather than to the conduct of the person against whom the claim is pressed or the filing of the claim itself, is exemplified by *United States* v. *Goldberg*, 256 F. Supp. 540 (D. Mass. 1966). In that case defendant allegedly made false loan applications to various banks, on the basis of which FHA-insured loans were disbursed. Rejecting the argument that the claim accrued upon submission to the bank of a false loan application, the court said:

> * * * [T]he essence of the cause of action is that the defendant caused a claim for payment to be presented to the United States and that act occurred when the defendant defaulted on the loans. This conclusion is reinforced by the Supreme Court's holding in *United States* v. *McNinch* [citation omitted] that until there has been a demand for money on the public treasury there is no claim within the scope of the False Claims Act. Consequently, I rule that the "act" from which the statute runs was the default, not the filing of false

[7] We may conveniently place in a subcategory within this line of decisions two cases holding that the cause of action does not accrue until such time as the false claim against the Government is finally paid. *E.g. United States ex rel. Vance* v. *Westinghouse Elec. Corp.*, 363 F. Supp. 1038 (W.D. Pa. 1973); *United States* v. *Klein*, 230 F. Supp. 426 (W.D. Pa. 1964), *aff'd*, 356 F. 2d 983 (3d Cir. 1966).

> [loan] applications, and that the action is timely. * * *. [256 F. Supp. at 541–42.]

The *Goldberg* decision is more akin to the case at bar than the cases cited in category (1), involving as it does the prompting by one party of the false claim of another. It might be said with considerable logical force that until such time as a false claim or demand actually is prompted by default upon insured indebtedness, the "act" of the party being sued remains inchoate or is not committed for purposes of the statute of limitations codified at 31 U.S.C. § 235 (1970). Only upon default can it be said with relative certainty that a false claim will be forthcoming.

Our research disclosed as well the recent decision of *United States* v. *Bornstein*, 423 U.S. 303 (1976), wherein the Supreme Court selected certain language which might be thought to lend support to the position of plaintiff—that a cause of action under 31 U.S.C. § 231 accrued, if at all, at such time as illegal payments allegedly were made. Therefore, we might place this decision in a third category. However, the statute of limitations was not in issue. The Court was called upon to decide how many $2,000 forfeitures should be imposed under 31 U.S.C. § 231 where the defendant subcontractor had knowingly made three shipments of deficient electron tubes for use in the performance of one prime contract, which deficiency in quality ultimately caused the Government to pay the entire amount of 35 invoices at the full contract price presented by its prime contractor. The complaint sought 35 $2,000 forfeitures, *i.e.*, one for each invoice provided to the Government. The defendant subcontractor's position was that there could be only one $2,000 forfeiture since there was only one prime contract pursuant to which false, fraudulent or fictitious invoices were served.

A divided court (5–3), speaking through Mr. Justice Stewart for the majority, could accept neither approach. In rejecting the Government's position that fully 35 forfeitures had occurred, the Court said:

> * * * The difficulty with this position is that it fails to distinguish between the acts committed by Model [the prime contractor] and the acts committed by United [the subcontractor and defendant]. [Footnote

> omitted.] The distinction is a critical one, because the statute imposes liability only for the commission of acts which cause false claims to be presented. [423 U.S. at 312.]

The Court was of the opinion that three statutory forfeitures had taken place:

> A correct application of the statutory language requires, rather, that the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures. In the present case United [the subcontractor and defendant] committed three acts which caused Model [the prime] to submit false claims to the Government—the three separately invoiced shipments to Model. * * * Thus, United's three shipments of falsely branded tubes to Model caused Model to submit false claims to the United States, and United is thus liable for three $2,000 statutory forfeitures representing the three separate shipments that it made to Model. [Footnote omitted.] [423 U.S. at 313.]

It is true that *Bornstein* emphasizes the culpable conduct of the person causing the submission by another of a false, fictitious or fraudulent claim to the Government. Likewise, the opinion downplays the significance of the precise number of false invoices actually filed with the Government. Nevertheless, there are at least two good reasons for which we should hesitate to extend the *Bornstein* rationale to the facts of the case before us. First, as stated, the question was not when a cause of action accrued under 31 U.S.C. § 231. The problem was how many $2,000 forfeitures should be imposed. Yet the second reason is the most forceful of all. If a cause of action accrues to the Government in this case at the time of the alleged bribe and fraudulent reappraisal, it would be quite possible that in future cases Government claims under the False Claims Act could become time-barred before any demand had been made upon the Government at all or before the Government learned of the fraud. As we see it, assuming arguendo that plaintiff is guilty of the acts alleged, to a legal certainty it cannot be said that he caused any false claims whatever to be served on the Government at least until the obligor with respect to Government-insured indebtedness defaulted thereon. Default would not necessarily occur with-

in 6 years of the inflated reappraisal. It is inconceivable to us that Congress intended to allow a false claimant to insulate himself from all liability merely by forestalling the time of filing such a claim until 6 years after the alleged fraudulent acts which make the filing possible. Yet such consequences would be the product of the holding plaintiff now seeks.

At the earliest, we think the Government's claim accrued at the time of the obligor's default. Since this event occurred less than 6 years prior to the filing of the Government's counterclaim it is not barred. We leave for another day the question of whether the cause of action accrues upon default or upon later filing of the application for insurance benefits. We hold that, in this case, the Government's cause of action did not accrue at the time of the alleged illegal payments to plaintiff.

A word must be added respecting defendant's affirmative defense of setoff. This defense charges plaintiff with deceit arising out of the same conduct alleged in the first counterclaim. Defendant concedes that this defense sounds in tort and relates to alleged conduct not germane to plaintiff's main action (for back pay), and as such, would encounter the 3-year time bar of 28 U.S.C. § 2415(b) (1970)[8] if pressed *other* than by way of offset. Plaintiff's motion to dismiss this affirmative defense must fail, inasmuch as 28 U.S.C. § 2415(f) (1970)[9] specifically authorizes defendant to assert by setoff its tort claim, in an amount not to exceed any recovery available to plaintiff. To this extent as well, plaintiff's motion must fail.

III

The Government's second counterclaim demands judgment in the amount of all bribes, kickbacks, secret emoluments, and other illegal payments allegedly made to plaintiff in con-

[8] "Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: * * *."

[9] "* * * A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery."

nection with the inflated appraisal of the New York property. The counterclaim states a legally sufficient common law right of action recognized by the Supreme Court long ago:

> * * * The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity or benefit in violation of his duty, or acquires any interest adverse to his principal without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received. [*United States* v. *Carter*, 217 U.S. 286, 306 (1910).]

Jurisdiction of such a counterclaim undoubtedly attaches in this court under 28 U.S.C. § 1503 (1970).[10]

Once again we are called upon by plaintiff's reply and motion to decide the ultimate question of whether this counterclaim is barred by the statute of limitations. Unlike the first counterclaim, we may assume that this cause of action accrued at the time of the alleged illegal payments. We have seen as well that 6 years passed between the dates of alleged payments and the filing of the counterclaim. Nonetheless, this counterclaim does not encounter the bar of the statute of limitations:

> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States * * * which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues * * *. [28 U.S.C. § 2415(a) (1970).]

28 U.S.C. § 2416 (1970) reads in part:

> For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which—
>
> * * * * *

[10] This statute provides:

"The Court of Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court."

The intent of this section is to permit the Government to have all controversies between it and the plaintiff litigated in one forum, once and for all. *Cherry Cotton Mills* v. *United States*, 327 U.S. 536 (1946).

(c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances; * * *.[11]

We think that the obligation of an agent of the Government to account to his principal for a payment illegally received, since premised upon an obligation created by law, and not upon the apparent mutual consent of the parties, derives from a contract implied in law within the meaning of 28 U.S.C. § 2415(a) (1970). *Cf. J. C. Pitman & Sons* v. *United States*, 161 Ct. Cl. 701, 705, 317 F. 2d 366, 368 (1963); *see* RESTATEMENT OF CONTRACTS 2d, § 5, comment *b* (Tent. Drafts Nos. 1–7, 1973); 1 S. WILLISTON, CONTRACTS § 3A at 14 (1957 ed.).[12] Moreover, defendant has placed before us an uncontroverted affidavit to the effect that not until March 23, 1970, were allegations received by the United States Attorney for the Eastern District of New York indicating the presence of a scheme by a mortgage company calculated to defraud the United States through false information on FHA mortgage insurance applications. Therefore, not until that date did the Government have actual knowledge of facts tending to indicate the presence of alleged fraud. Nothing in the record indicates that at any time prior to March 23, 1970, facts were reasonably available to defendant which would have provided constructive notice of such alleged illegal payments. To controvert the assertions of fact contained in

[11] Plaintiff's contention that 28 U.S.C. § 2501 (1970) applies to counterclaims by the United States must be rejected. *Dugan & McNamara, Inc.* v. *United States*, 130 Ct. Cl. 603, 124 F. Supp. 650 (1954).

[12] We are not unmindful of the principle that a plaintiff may not recover against the United States under the Tucker Act, 28 U.S.C. § 1491 (1970), where the claim is based solely on a contract implied in law. *Merritt* v. *United States*, 267 U.S. 338, 341 (1925); *J. C. Pitman & Sons* v. *United States*, 161 Ct. Cl. 701, 704, 317 F. 2d 366, 368 (1963). This rule derives from judicial construction of the Tucker Act, however, and our research has disclosed no similar authority which would bar recovery in favor of the United States upon this sort of implied contract where it chooses to interpose it by way of counterclaim under 28 U.S.C. § 1503 (1970). Indeed, one should hesitate to espouse such a view in light of the expansive language of the latter jurisdictional statute (*see* note 8, *supra*). In similar situations we have recognized that the Government may assert counterclaims in this court pressing causes of action of which we would have no subject matter jurisdiction, were the same claims placed before us by a plaintiff. *See, e.g., Continental Management, Inc.* v. *United States*, 208 Ct. Cl. 501, 527 F. 2d 613 (1975), wherein the Government's counterclaim, sounding in tort, was sustained even though the Tucker Act gives us no jurisdiction to hear tort claims filed here by plaintiffs.

an affidavit filed in support of a motion for summary judgment, or in opposition thereto, the party involved may not rely upon bare denials but must adduce by affidavits or otherwise evidence tending to place the disputed matter genuinely in issue. Rule 101(f); *Putnam Mills Corp.* v. *United States*, 202 Ct. Cl. 1, 15, 479 F. 2d 1334, 1341 (1973). On the basis of the uncontroverted affidavit and exhibits before us we conclude that the running of the limitation period set down in 28 U.S.C. § 2415(a) (1970) was tolled at least until March 23, 1970, under 28 U.S.C. § 2416(c) (1970), when facts first became known to responsible officials charged with investigation of possible illegal payments to plaintiff. Therefore, the second counterclaim must be remanded for trial.

IV

In summary and conclusion, plaintiff's motion for summary judgment is allowed only to the extent that he is entitled to judgment for back pay commencing upon the date of his official reinstatement June 19, 1974, and ending with the date of his actual return to work on November 5, 1974. Defendant's motion for summary judgment is granted as to plaintiff's claim for back pay for the period of indefinite suspension, April 6, 1972–June 19, 1974, and as to this claim the petition is dismissed. Upon further consideration of plaintiff's motion we find that insofar as it seeks dismissal of defendant's first affirmative defense and first and second counterclaims, it should be and it is denied. Judgment for plaintiff is subject thereto and the case is ordered remanded to the trial judge pursuant to Rule 131 for further proceedings consistent with this opinion.

NICHOLS, *Judge*, concurring in part, dissenting in part:

This pay case presents us with interesting puzzles. Though first inclined the other way, I am persuaded by Judge Bennett's able analysis that the Civil Service Commission does not disapprove, but in fact recommends, that a person indicted for the reason Mr. Jankowitz was here should be suspended because of the indictment until the outcome of his trial. This assumes, of course, that the offense charged

had such a connection with the job situation that it would be irrational to expect useful or dependable work from the employee until the charges were resolved. Suspension being a proper course to have taken, the unsuccessful outcome of the trial, from the Government's point of view, does not make the suspension from the beginning an "unjustified or unwarranted personnel action". To hold otherwise would read into the statute what is not in it.

I have more difficulty than he does with *United States* v. *Bornstein*, 423 U.S. 303 (1976). This case construes the word "act" in the False Claims statute to mean the false assertion of the initial violator. This is for the purpose of counting the number of "acts" penalized at $2,000 per "act", when the misstatements are passed onto the Government by a third party who may have been innocent. In *Bornstein* there were three false invoices by Bornstein's company, a subcontractor, to the prime contractor, causing thirty-five by it to the Government. Held, by the majority, there were three $2,000 "acts", not thirty-five. We must here construe the limitation provision which is very much in *pari materia* and bars suit for the forfeitures after six years from the "acts". How can we give the same word "act" a different meaning, employing ordinary and accepted techniques of statutory construction?

The only persuasive reason is that the interpretation consistent with *Bornstein* produces an absurd result which Congress could not have intended. It would cause limitations to run on some $2,000 forfeitures before the Government's claim even accrued. These results would occur in few cases and it is possible to argue, though not very persuasively, that Congress intended them. Plaintiff's counsel did so argue.

I think the reasons not sufficient for a non-literal interpretation. It is true, in everybody's favorite Supreme Court decision, *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892), it is said that statutes may be construed contrary to their literal language to avoid absurd results, contrary to the manifest intention of Congress. P. 459. But this is said in course of relieving the well-meaning but technically guilty church from a civil penalty. The authorities cited there deal with that situation. Thus at 459 Lord Coke is quoted:

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* * * "Acts of Parliament are to be so construed as no man that is innocent or free from injury or wrong be, by a literal construction, punished or endamaged."

Here we are invited to fix up defective language to assess a penalty, not to relieve from one. In the very *Bornstein* decision that makes us the trouble, the Court notes at fn. 8, p. 313, that we are actually construing a criminal statute and that such provisions:

> "* * * must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions." (Citing *United States* v. *McNinch*, 356 U.S. 595, 598 (1958).)

I read this to mean that a False Claims Act penalty must meet a double test. The assessment must be within the literal language *and* it must be within the Congressional intent as judicially conceived. Therefore, the designated culprit is not liable for the penalty if the literal language does not cover the case, even though Congress may have wanted to cover it and thought it had done so. I am constrained to hold that limitations on the $2,000 claims have run.

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533 F. 2d 550

PHILIP T. AND EDITH W. SHARPLES v. THE UNITED STATES

[No. 63-73. Decided April 14, 1976]

OPINION

Taxes; income tax; deductions; legal expenses; tax litigation; "origin of the claim" doctrine.—In this suit, before the court on a stipulation of facts, plaintiff, a former majority shareholder of Sharples Oil Corp. (SOC), a Delaware corporation, seeks a 1966 deduction for expenses of Venezuelan counsel in successfully contesting a Venezuelan tax deficiency assessed as a result of transfer in 1960 to a newly created subsidiary S–V of SOC's leasehold interest in certain Venezuelan oil properties in exchange for all of S–V's stock and the subsequent sale in 1960 of the leasehold by S–V to Pure Oil Co. Pure and S–V treated this transaction as a non-taxable sale under Venezuelan law. In 1963–64 SOC and S–V were liquidated and plaintiff received various liquidating distributions as a transferee. In 1964 Venezuela noticed SOC of proposed tax deficiencies from the 1960 sale. By operation of Delaware law, liability for the tax would have devolved upon plaintiff as recipient of assets from a

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liquidated corporation. The Internal Revenue Service disallowed the legal expenses deduction, plaintiff paid the assessed deficiency, and upon disallowance of his refund claim plaintiff brought this suit. Defendant contends that plaintiff may not use subsec. 212(3) of the Code because the Venezuelan tax was incurred by SOC, not plaintiff, and that said subsection looks to the "origin of the claim" in terms of the person liable for the tax, and that the "origin of the claim" rule also looks to the transaction from which the tax liability arose, i.e. the SOC liquidation which was a capital transaction. It is *held* that the legal expenses were properly deductible from plaintiff's 1966 income under subsec. 212(3). Neither the fact that plaintiff's corporation was initially liable for Venezuelan tax, nor the fact that the legal expenses arose in connection with a capital transaction precludes plaintiff's use of subsec. 212(3). Plaintiff's claim for refund should be allowed and judgment is entered for plaintiff, the amount of recovery to be determined pursuant to Rule 131(c).

Taxes; income tax; deductions; expenses; legal expenses; tax litigation.

[1] While subsec. 212(3) of the Internal Revenue Code of 1954 permits deductions from gross income of a taxpayer's expense incurred in connection with the determination, collection or refund of "any tax," and the legislative history of this subsection indicates that Congress intended that any expenses incurred in contesting any liability collected as a tax or as part of a tax be deductible, under the "origin of the claim" rule where the tax obligation is that of another, subsec. 212(3) is of no avail to the taxpayer. However, where liability for a tax imposed by Venezuela in connection with the sale of a leasehold interest in certain Venezuelan oil properties owned by a Delaware corporation of which plaintiff was the majority shareholder devolved upon plaintiff by operation of Delaware law, plaintiff is not precluded from gaining the benefit of subsec. 212(3).

Internal Revenue ⇐ 566.1

Statutes; construction and operation; ordinary meaning of terms.

[2] The ordinary and commonly understood meaning shall be attributed to the terms employed in a statute unless a contrary meaning is clearly intended. Unambiguous wording of a statute shall be given its plain and commonly understood meaning.

States ⇐ 188, 190

Taxes; income tax; deductions; expenses; legal expenses; tax litigation.

[3] Where Delaware corporation SOC of which plaintiff was the majority shareholder created subsidiary S–V to which SOC transferred its leasehold interest in certain Venezuelan oil properties in exchange for all of S–V stock, S–V then sold the leasehold to an unrelated corporation, and subsequently SOC and S–V liquidated, plaintiff receiving various liquidating distributions as a transferee,

Opinion of the Court

since plaintiff under Delaware law was liable for a tax imposed by Venezuela against SOC in connection with the said sale, he is entitled to deduct the legal expenses he incurred in contesting the tax in view of the clear wording of subsec. 212(3) of the Code and implementing regulations providing a deduction for expenses incurred in connection with "any tax," and since the legislative history of subsec. 212(3) gives no indication of congressional intent to limit the statute by the "initial transaction" exception. Subsec. 212(3), its implementing regulations, and legislative history provide no different treatment for expenses incurred in fighting a tax which arose from a capital transaction as opposed to expenses for contesting a tax which arose from a non-capital transaction.

Internal Revenue ⇐ 566

Taxes; income tax; deductions; expenses; legal expenses; tax litigation.

[4] The philosophy inherent in subsec. 212(3) of the Code seems to be based on the idea that taxpayers should be encouraged to assert their legal rights by contesting imposition of unjustified taxes. Given a choice between mere consistency of tax treatment embodied in the "origin of the claim" doctrine and encouraging taxpayers to assert their rights to contest illegal taxes, this court prefers the latter alternative. Where a foreign tax is concerned and in consideration of desired balance of payments, in terms of economic philosophy taxpayers should be encouraged to resist the imposition of unwarranted tax liability.

Internal Revenue ⇐ 566

William L. Goldman, for plaintiff. *Thomas E. Jenks*, attorney of record for plaintiff. *John M. Skilling, Jr.* and *Herbert L. Awe*, of counsel.

Allen C. Lewis, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser* and *Donald H. Olson*, of counsel.

Before NICHOLS, KASHIWA, and KUNZIG, *Judges*.

KUNZIG, *Judge*, delivered the opinion of the court.

In this income tax refund suit plaintiff seeks a 1966 deduction for legal expenses incurred while resisting a Venezuelan tax deficiency. The potential Venezuelan tax liability devolved on plaintiff as the recipient of assets from a liquidated corporation that would have incurred the tax. The issue comes before the court for resolution based upon the parties' stipulation of facts pursuant to Ct. Cl. Rule 134(b)(2). We

hold that plaintiff is entitled to deduct the legal expenses under the provisions of subsection 212(3) of the Internal Revenue Code of 1954.[1]

As stipulated, Philip Sharples (plaintiff)[2] was the majority shareholder of Sharples Oil Corp. (SOC), an entity organized under the laws of Delaware, until its 1963–64 liquidation. In 1957, SOC acquired a leasehold interest in certain Venezuelan oil properties. By 1960, SOC had decided to sell the leasehold to a subsidiary of Pure Oil Co. (Pure). SOC accomplished this objective by creating a subsidiary, Sharples-Venezuela Oil Corp. (S–V). SOC transferred the leasehold to S–V and received all of the S–V stock in return. S–V then sold the leasehold to Pure. Both Pure and S–V treated this 1960 transaction as a non-taxable sale under the Venezuelan law.

In 1963–64, SOC (including S–V) liquidated. Plaintiff received various liquidating distributions as a transferee. Dissolution became final in March 1964. Nearly seven months later, Venezuela issued a notice to SOC of proposed tax deficiencies from the 1960 sale. Delaware law would have imposed personal liability on the former SOC shareholders to pay the tax.[3] However, plaintiff retained Venezuelan counsel to fight the Venezuelan tax deficiency.

Eventually these efforts were successful, and the tax avoided. Plaintiff paid Venezuelan counsel $168,609.15. In his 1966 U.S. income tax return, he deducted the legal expenses. The Internal Revenue Service (IRS) disallowed this deduction, treating the payments as an additional capital contribution to SOC. The IRS assessed a deficiency which

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[1] § 212(3), Int. Rev. Code of 1954 provides:

"In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year— * * * in connection with the determination, collection, or refund of any tax."

[2] For convenience only Mr. Sharples will be referred to as plaintiff. Mrs. Sharples is a party in the instant action merely because the tax returns involved were filed jointly.

[3] Under Delaware law if all of a corporation's assets are disposed of without consideration or *distributed among its shareholders*, a creditor of the corporation is entitled to pursue those assets. *Unemployment Comp. Comm'n* v. *Geo. W. McCaulley & Son, Inc.*, 22 A. 2d 862 (Del. Ch. Ct. 1941); *Berwick* v. *Associated Gas & Elec. Co.*, 20 Del. Ch. 265, 174 A. 122 (1934). Where a corporation distributes assets to a shareholder leaving unsatisfied creditors, the creditors may recover directly from the distributees. *John Julian Constr. Co.* v. *Monarch Builders, Inc.*, 306 A. 2d 29, 35 (Del. Super. 1973), *aff'd*, 324 A. 2d 208 (Del. 1974).

plaintiff paid. After the IRS rejected his subsequent refund claim, plaintiff timely brought the present action.

Plaintiff justifies his 1966 deduction of the Venezuelan legal fees as "ordinary and necessary expenses paid or incurred * * * in connection with the determination, collection or refund of any tax." § 212(3), Int. Rev. Code of 1954. Plaintiff buttresses this argument by pointing to the income tax regulations. "[E]xpenses paid or incurred * * * for tax counsel * * * or in connection with any proceedings involved in determining the extent of his tax liability or in contesting his tax liability are deductible." Treas. Reg. § 1.212–1(*l*).

Defendant resists plaintiff's use of the rather broad provisions of subsection 212(3) and the regulations by urging application of two exceptions to deductibility. Both exceptions involve variations of what has been called the "origin of the claim" rule.[4] The first exception arises in conjunction with subsection 212(3). It looks to the origin of the tax claim in terms of the *person* liable for the tax. A taxpayer receives a deduction for expenses incurred in contesting his own tax, but cannot deduct expenses attributable to resisting a tax imposed on another. The Government argues that Sharples may not use subsection 212(3) in the present action because the Venezuelan tax was incurred by SOC, not plaintiff.

Until the instant case, the second exception has been applied to deny only subsection *212(2)* and *162(a)* deductions.[5] This second version of the "origin of the claim" rule looks to the *transaction* from which the tax liability arose (initial transaction). As a general rule, a taxpayer must subtract from the proceeds of a capital transaction (*i.e.* capitalize)

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[4] The phrase "origin of the claim" stems from the opinion of the Supreme Court in *Woodward* v. *Commissioner*, 397 U.S. 572 (1970). Construing the decision in *United States* v. *Gilmore*, 372 U.S. 39 (1963), the Court noted that the proper test for deductibility should focus on "the *origin* and character of the claim against the taxpayer." *Woodward*, *supra* at 578 (emphasis added).

[5] Subsection 162(a) governs the deductibility of *trade or business* expenses. *See* note 7, *infra*. Subsection 212(2) allows deductions for personal expenses incurred "for management, conservation, or maintenance of *property held for the production of income*." *See* note 8, *infra*. Subsection 212(3) controls deductions for personal expenses paid in resolving *tax liabilities*. *See* note 1, *supra*. While the three statutes are related in that they all deal with deductions, they are unrelated in that each deals with a separate type of deductible expense.

Note that plaintiff relies only upon subsection 212(3) and *not* on subsections 212(2) and 162(a) in this refund suit.

all expenses which arise, directly or indirectly, from the capital transaction. Defendant would have us enlarge this second exception in the present action to apply not only to subsection 212(2), but also to 212(3). Under this rationale, defendant argues, we would have to deny plaintiff's 1966 deduction because plaintiff incurred the legal fees as a result of the SOC liquidation, a capital transaction.

The court rejects defendant's attempts to remove this case from subsection 212(3) by use of the "origin of the claim" doctrine. We hold that plaintiff may deduct the legal expenses under subsection 212(3).

I. *Subsection 212(3):*

We begin our analysis by examining the provisions of subsection 212(3). This statute provides:

> In the case of an individual, there shall be allowed as a deduction, all the ordinary and necessary expenses paid or incurred during the taxable year * * * in connection with the determination, collection, or refund of any tax. [§ 212(3), Int. Rev. Code of 1954].

The legislative history of subsection 212(3) illustrates the breadth that Congress intended for this statute. "*Any expenses* incurred in contesting *any liability* collected as a tax or as a part of the tax will be deductible." H. Rep. No. 1337, 83d Cong., 2d Sess. A 59 (1954). *See also* H. Rep. No. 1337, *supra* at p. 29 and S. Rep. No. 1622, 83d Cong., 2d Sess., 34, 218 (1954).

Application of the clear language of subsection 212(3) would usually compel our holding for plaintiff, granting him the right to a deduction in the instant case for expenses incurred in fighting the Venezuelan tax. However, we must first deal with defendant's "origin of the claim" arguments in its attempt to override application of subsection 212(3).

II. *Origin of the claim—person taxed:*

In *United States* v. *Davis*, 370 U.S. 65 (1962), *reh. denied*, 371 U.S. 854 (1962), a taxpayer paid his wife's legal expenses incurred pursuant to a divorce settlement. Part of such legal expense was directed toward his wife's tax treatment of property transferred during the divorce. The Supreme Court denied taxpayer's claim for a deduction, reasoning that subsection 212(3) only applied to the taxpayer's legal expenses and not expenses paid for the benefit of another.

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> As to the deduction of the wife's [legal] fees, we read the statute, if applicable to this type of tax expense, to include only the expenses of the taxpayer himself and not those of his wife. Here the fees paid her attorney do not appear to be 'in connection with the determination, collection, or refund' of any tax of the taxpayer. [*United States* v. *Davis*, *supra* at 74].

Later, in 1967, the Court of Claims further dealt with this subsection 212(3) exception. The court was faced with a case in which the taxpayer incurred legal expenses by resisting a tax liability of a corporation. Taxpayer's obligation to pay the debt was based on an indemnity agreement. The court held that the indemnity agreement did not make the corporation's legal expenses "those of the taxpayer" for purposes of subsection 212(3). Only if the taxpayer incurred the expense himself or by operation of law as a transferee could the expenses be deducted under subsection 212(3). *Southern Arizona Bank and Trust Co.* v. *United States*, 181 Ct. Cl. 426, 429–30, 386 F. 2d 1002, 1005 (1967), *cert. denied*, 391 U.S. 967 (1968).

In short, under the first "origin of the claim" exception the court must go beyond the statutory provisions of subsection 212(3) to determine the taxpayer's entitlement to a deduction. If the tax liability is personal to the taxpayer, either because it is his liability or because the liability is imposed on him by operation of law, subsection 212(3) applies. *Southern Arizona Bank*, *supra*. If, however, the tax obligation is that of another, subsection 212(3) is of no avail to the taxpayer.

Defendant would have the court find the instant tax liability to be that of SOC rather than plaintiff. The defendant is correct in its view that the original tax liability belonged to SOC. However, defendant ignores the fact that liability for the Venezuelan tax devolved upon plaintiff at the time of the liquidation by operation of Delaware law.[6] Plaintiff's liability as created by Delaware law made him responsible for the debt within the test established by *Southern Arizona Bank*. The tax liability was personal to the taxpayer. Defendant's first argument is inapplicable to the present facts. Plaintiff is not precluded from gaining the benefit of subsection 212(3).

[6] See discussion of applicable Delaware law at note 3, *supra*.

III. "*Origin of the claim*"—*initial transaction:*

Defendant further urges the court to enlarge the second "origin of the claim" exception in the instant case. In this second argument, defendant relies upon the rationale inherent in capitalization treatment of certain expenditures. Where expenses arise in connection with a capital transaction, the taxpayer must capitalize such expenses rather than deduct them from ordinary income. As stated above, defendant would have us enlarge this second exception to apply to subsection 212(3) as well as subsection 212(2). The liquidation of SOC was a capital transaction. Since the legal expenses arose in connection with a capital transaction reasons defendant, they should be capitalized by plaintiff rather than deducted under subsection 212(3).

We evaluate defendant's second argument in the context of the clear language of the statute, its legislative history, case law and policy considerations. Defendant's "initial transaction" version of the "origin of the claim" rule cannot be upheld in the present fact situation.

Again, we start with the clear wording of subsection 212(3). This provision grants a deduction for "expenses incurred" in conjunction with "any tax,"—certainly the clearest, most compelling reason to reject defendant's attempts to engraft an exception onto subsection 212(3). "[T]he ordinary and commonly understood meaning shall be attributed to the terms employed in the statute unless a contrary meaning is clearly intended." *Benton* v. *United States*, 203 Ct. Cl. 263, 269, 488 F. 2d 1017, 1020 (1973). "[T]he unambiguous wording of a statute shall be given its plain and commonly understood meaning." *Selman* v. *United States*, 204 Ct. Cl. 675, 680, 498 F. 2d 1354, 1356 (1974). *See also*, *Sode* v. *United States*, *ante* at 180, 531 F. 2d 531 (1976). *Prudential Ins. Co.* v. *United States*, 162 Ct. Cl. 55, 65, 319 F. 2d 161, 166 (1963). Plaintiff is entitled to deduct the expenses incurred in fighting the Venezuelan tax under the clear wording of subsection 212(3). Defendant has not demonstrated that Congress intended to limit the statute by the "initial transaction" exception.

Further, defendant's own regulations underscore the breadth of subsection 212(3) and give no hint of any "initial transaction" exception. "Expenses paid * * * in conjunction with *any proceedings* involved in determining the extent of [taxpayer's] tax liability or *in contesting his tax liability* are deductible." Treas. Reg. § 1.212–1(*l*) (emphasis added).

Congress, too, demonstrated its desire to have subsection 212(3) apply in a sweeping manner. "Any expenses incurred in contesting any liability collected as a tax or as part of the tax will be deductible." S. Rep. No. 1622, *supra* at 218; H. Rep. No. 1337, *supra* at A 59. Again, there is no indication of any intent that the "initial transaction" version of the "origin of the claim" rule override the clear meaning of subsection 212(3).

Despite the clear wording of subsection 212(3), the regulations and legislative history, defendant argues that the holdings in *Arrowsmith* v. *Commissioner*, 344 U.S. 6 (1952), *reh. denied*, 344 U.S. 900 (1952), *Woodward* v. *Commissioner*, 397 U.S. 572 (1970) and *United States* v. *Hilton Hotels Corp.*, 397 U.S. 580 (1970) compel adoption of its "initial transaction" exception in the subsection 212(3) area. In *Arrowsmith*, the Supreme Court looked to the nature of the original transaction to deny business expense deductions claimed under the predecessor of subsection 162(a).[7] Since the expenses in question arose from a capital transaction, reasoned the Court, expenses incident thereto should have been treated as capital items. This doctrine was later applied in both the subsection 162(a) and 212(2)[8] contexts in *Woodward* and *Hilton Hotels*. Again, the nature of the original transaction was crucial to the determination. Where the original transaction was a capital transaction, expenses

[7] Subsection 162(a) provides in part:

"There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. * * *"

[8] Subsection 212(2) provides:

"In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year * * * for the management, conservation, or maintenance of property held for the production of income."

flowing therefrom had to be capitalized. Defendant contends that since the "initial transaction" exception overrides subsections 162(a) and 212(2) it should also override subsection 212(3).

The short answer to defendant's argument is that the statute, the regulations and the legislative history of subsection 212(3) provide *no different treatment* for expenses incurred in fighting a tax which arose from a capital transaction as opposed to expenses for contesting a tax which arose from a non-capital transaction.

Further, to the best of our knowledge, no court has ever extended the *Arrowsmith* initial transaction rule to override subsection 212(3). Defendant has not directed our attention to any such case, and we have been unable to discover one. To the contrary, the cases to date dealing with subsection 212(3) seem without exception to have assumed that if the expense relates to a taxpayer's personal tax liability, the inquiry is complete and a subsection 212(3) deduction allowable. *See, e.g., Munn* v. *United States*, 197 Ct. Cl. 233, 455 F. 2d 1028 (1972); *Carpenter* v. *United States*, 168 Ct. Cl. 7, 338 F. 2d 366 (1964); *Palmquist* v. *United States*, 284 F. Supp. 577, 579 (N.D. Cal. 1967); *Bonnyman* v. *United States*, 156 F. Supp. 625 (E.D. Tenn. 1957), *aff'd*, 261 F. 2d 835 (6th Cir. 1958). Particularly notable along these lines is *Collins* v. *Commissioner*, 54 T.C. 1656 (1970). In *Collins*, the Tax Court allowed taxpayers a subsection 212(3) deduction for Certified Public Accountant (CPA) expenses incurred in tax planning despite the fact that much of the CPA's advice was directed to the purchase of an apartment building as an investment. Although the CPA expenses arose in a capital transaction, taxpayers were still allowed to use subsection 212(3). In short, defendant's argument that the *Arrowsmith* "initial transaction" rule overrides subsection 212(2) does not find acceptance in case law.

In addition to principles of statutory construction and case law, policy considerations compel rejection of defendant's "initial transaction" exception to subsection 212(3). The philosophy inherent in subsection 212(3) seems to be based on the idea that taxpayers should be encouraged to assert

their legal rights by contesting imposition of unjustified taxes. Defendant attempts to overcome this strong philosophy with the rationale that stems from the "origin of the claim" rule. This competing rationale rests on the belief that all expenses which stem from a capital transaction should rationally be "matched" or equated with all gains from the same capital transaction and the expenses should receive identical tax treatment as the gains. The "origin of the claim" reasoning is of some weight, but is not strong enough to overcome the subsection 212(3) philosophy. Given a choice between mere consistency of tax treatment embodied in the "origin of the claim" doctrine and encouraging taxpayers to assert their right to contest illegal taxes, we prefer the latter alternative.

Beyond the factors which compel us to reject defendant's personal liability and "initial transaction" exceptions, other overall policy considerations support our conclusion that plaintiff is entitled to a subsection 212(3) deduction for the legal expenses involved in the present action.

First, plaintiff's decision to contest the improper Venezuelan tax created a savings for defendant in non-tax areas. At a time when the United States balance of payments was unfavorable, plaintiff's resistance of the Venezuelan taxes prevented an even further imbalance. Had plaintiff been discouraged from fighting the Venezuelan tax by defendant's hostile interpretation of subsection 212(3), certainly the unfavorable U.S. trade balance would have increased. In terms of economic philosophy, certainly where a foreign tax is concerned, taxpayers should be encouraged to resist the imposition of unwarranted tax liability. Rejecting defendant's "origin of the claim" arguments should further this goal.

Second, defendant's negative attitude toward plaintiff's attempted deduction could have an additional negative impact on the Treasury. Had plaintiff paid the Venezuelan tax, he might have been entitled to a U.S. tax credit for his foreign tax payment,[9] and the Government would have lost additional revenue. Generally, efforts by U.S. taxpayers to reduce

[9] *See* §§ 901, et seq., Int. Rev. Code of 1954, for the Foreign Tax Credit provisions.

their foreign taxes will at the same time diminish credits on their U.S. taxes. Thus, the IRS has a direct stake in the success of U.S. taxpayers contesting foreign taxes. One might well question the position of the IRS against plaintiff's deduction in the instant case. Our holding avoids such a problem.

Third, acceptance of defendant's "origin of the claim" arguments would create a distinction without a logical difference in the instant case. Presumably, if plaintiff paid a tax attorney for advice as to whether or not to fight the Venezuelan tax from the point of view of planning its own tax affairs, such legal expenses would be deductible under subsection 212(3). Yet defendant would disallow the further legal expenses incurred in actually contesting the tax. We see no logical reason for treating either legal expense differently from the other. Again, we are led to reject defendant's attempt to engraft or broaden subsection 212(3) exceptions.

In summary, we are faced with a situation where taxpayer incurred legal expenses in 1966 pursuant to his resistance of a Venezuelan tax liability which would have devolved upon him as recipient of assets from a liquidated corporation, personally, by operation of Delaware law. The legal expenses were properly deductible from plaintiff's 1966 income under subsection 212(3) of the Internal Revenue Code of 1954. Neither the fact that plaintiff's corporation was initially liable for Venezuelan tax, nor the fact that the legal expenses arise in connection with a capital transaction precludes plaintiff's use of subsection 212(3). This conclusion emerges from Treasury Regulations, Congressional intent, case law, the philosophy inherent in subsection 212(3) and simply, *from the clear language of the statute.*

CONCLUSION OF LAW

Upon the foregoing opinion, which contains the essential findings of fact as stipulated by the parties, the court concludes as a matter of law that plaintiff's claim for refund should be allowed and judgment is entered for plaintiff. The amount of the recovery will be determined pursuant to Ct. Cl. Rule 131(c).

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533 F. 2d 556

CONSOLIDATED DIESEL ELECTRIC COMPANY v. THE UNITED STATES

[No. 365–74. Decided April 14, 1976]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Contracts; interpretation; two-step procurement; constructive change; substitution of approved item; configuration management and controls program.—The subject contract for the design and completion of generator sets of which the engines were the major component, was initiated by a Letter Request for Technical Proposals under a two-step, formally advertised procurement. Bidders were informed that the engines incorporated in the technical proposals had to be qualified and listed on a qualified products list. The generators with the configuration of engines involved came under a configuration management and controls program ordered by a directive of the Department of Defense and was a new application. Plaintiff's technical proposal included four possible 100 KW and 200 KW engine "family" combinations using Caterpillar and Allis-Chalmers engines, and contained an option clause stating that the final choice of the engine "family" combination would be made by plaintiff based on qualification status at that time and other pertinent engine factors. In response to the contracting officer's request for clarification of its proposal, plaintiff submitted an amendment which clarified its configuration management plan, including elaboration of baseline control. Thereafter plaintiff's proposal was accepted. Plaintiff selected Configuration 1 (of the four combinations listed in its proposal) using the Caterpillar engines for the generator sets. The contract was awarded on May 14, 1970. Plaintiff and Caterpillar, however, were experiencing difficulties in reaching agreement on terms, and plaintiff requested a change from Configuration 1 to Configuration 4, substituting Allis-Chalmers engines. Upon denial of this request, plaintiff presented its claim for an equitable adjustment for costs occasioned by being forced to utilize Caterpillar engines, and alleging improper interference with its performance and wrongful contract interpretation beyond the scope of the contract as awarded. Plaintiff's claim was denied by the contracting officer and subsequently by the Armed Services Board of Contract Appeals. Plaintiff's suit here seeks under Count I, a review under Wunderlich Act standards of the Board's decision and under Court II, damages for alleged breach of contract. Although the Board concluded that determination of whether plaintiff submitted one technical proposal with four engine combinations, or four separate technical proposals, was not necessary to

the outcome of its decision, the court considers that the Board erred in this respect and deprived plaintiff of its rights under the option clause and accordingly has considered this issue. It is *held* that plaintiff's technical proposal was one proposal with four engine combinations with plaintiff's option clause, and not four separate proposals as defendant contends. It is also *held* that the contract did not require that plaintiff utilize Caterpillar manufactured engines, set forth as Configuration 1, exclusively, but it had the option of utilizing the remaining engine combinations 2, 3 or 4 during the Step 2 period. Accordingly, when defendant unlawfully stopped and continued to stop plaintiff from substituting engines manufactured by Allis-Chalmers for those manufactured by Caterpillar, its action constituted a constructive change to the contract entitling plaintiff to an equitable adjustment. Plaintiff is entitled to recover under Count I of the petition and judgment is entered on the issue of liability. In view of granting relief under Count I, relief is denied under Count II. The parties' motions for summary judgment are granted and denied consonant with the opinion. Further proceedings in this court are suspended for 6 months pursuant to Rule 149 for determination by the Board of the amount due plaintiff.

Contracts; disputes; question of law; what constitutes.

[1] It is a question of law whether the totality of the request for proposals, plaintiff's proposal, and the resultant contract "froze" the contract's engine specifications at the time of award, and accordingly the court is not bound by the decision of the contract appeals board regarding its interpretation thereof, but is free to re-examine the contract language and independently reach its own conclusion.

United States ⊂⊃ 73(14)

Contracts; interpretation; option clause; configuration management and controls program.

[2] Where plaintiff submitted a technical proposal for design and completion of generator sets of which the engines which had to be qualified and listed on a qualified products list were the major component, in response to defendant's request for proposals as part of a two-step procurement procedure, wherein the successful bidder's proposal became a part of the contract, and plaintiff's proposal included an option clause providing for use of four possible engine combinations and also reciting that the final choice of the engine "family" combination to be utilized in Step 2 of the procurement would be made by plaintiff, and where in response to defendant's request for clarification of the proposal plaintiff submitted a baseline control provision which defendant thereafter approved and which became a part of the configuration management proposal incorporated into the technical proposal, plaintiff's technical proposal represented one proposal of four engine combinations with plaintiff's option clause; if interpreted as four separate technical proposals,

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not only would four bids be self-defeating but the option clause would be nullified.

United States ⇐ 64

Contracts; interpretation; ambiguity.

[3] The rule is that if the language of a contract document is ambiguous and the contractor's interpretation is reasonable, the ambiguity will be construed against the Government as the drafter of the document. Thus, where the instructions for preparing technical proposals as part of a two-step procurement procedure provided that the "successful bidder's proposal shall become a part of the contract" and that "all lists of materials and statements made in the proposal shall become binding on the contractor and shall not be altered without prior approval of the Contracting Officer," and where plaintiff's proposal included an option clause providing for use of four possible engine combinations, as clarified by plaintiff in Sec. 4 of the baseline clarification, all a part of the configuration management proposal incorporated into plaintiff's technical proposal, the word "contract" as used in the aforesaid instructions included plaintiff's option clause and clarification, and since the option clause allows substitution of other engine configurations during the second step of the procurement the clause "shall not be altered without prior approval of the Contracting Officer" was superfluous in this respect.

United States ⇐ 64, 70(3)

Contracts; interpretations; reasonable interpretation.

[4] Contract clauses are to be construed to effectuate the spirit and purpose of the clauses.

Contracts ⇐ 143(4)

Contracts; interpretation; substitution of equal product.

[5] Where it has been determined that plaintiff's technical proposal which included an option clause providing for use of four possible engine combinations, represented one technical proposal with four engine combinations rather than four separate technical proposals, the contracting officer's refusal to allow a substitution of the engine combination of Configuration 4 for that of Configuration 1 (first designated by plaintiff), was improper and constituted a constructive change to the contract, since both engines were on defendant's qualified products list.

United States ⇐ 73(12)

Contracts; disputes; trial de novo.

[6] a party cannot maintain a separate breach of contract action which seeks no relief further or different from that which was available to it under the contract.

Contracts ⇐ 328(1)

Philip M. Risik, for plaintiff; *Daniel M. Ross*, attorney of record. *Wachtel, Wiener, Ross & Matzkin*, of counsel.

Howard G. Slavit, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DAVIS and KASHIWA, *Judges*.

KASHIWA, *Judge*, delivered the opinion of the court:

Plaintiff's claim is based on contract No. F04606–70–D–0192, dated May 14, 1970, effective June 1, 1970, between plaintiff and defendant, under which plaintiff supplied required quantities of 100- and 200-kilowatt Diesel-Engine Generator sets for the Air Force.

Plaintiff's original petition was filed in this court on October 8, 1974. It later filed its amended petition on March 3, 1975. The amended petition seeks:

> *In Count I* (labeled "First Cause for Relief")
>
> A review under the standards of the Wunderlich Act, 41 U.S.C. §§ 321, 322 (1970), of the decision of the Armed Services Board of Contract Appeals (hereafter ASBCA) in Appeal of Consolidated Diesel Electric Company Contract No. F04606–70–D–0192, ASBCA 16826, to determine that the decision is erroneous as a matter of law and is not supported by substantial evidence.
>
> *In Count II* (labeled "First Cause of Action")
>
> Damages in excess of $800,000 for alleged breach of contract based on facts in the record to support Count I.

The court is requested to either remand the case to the ASBCA for negotiation or determination of the amount of the equitable adjustment pursuant to Rule 149 or to determine the damages for breach of contract pursuant to Rule 131(c).

The case is before the court on cross motions for summary judgment. For reasons hereafter stated, we allow plaintiff's motion for summary judgment with relation to its cause of action alleged in Count I of plaintiff's amended petition. Our discussion hereafter, unless otherwise indicated, relates to plaintiff's Count I request for review.

The ASBCA decision involved mixed questions of law and fact. Since the disposition of this case is based on the reasons hereafter stated, we do not deem it necessary to attempt to delineate the questions of law and fact.

Opinion of the Court

The following are portions of material facts as found by the ASBCA which we deem material herein. Otherwise, they are undisputed. Bids for the subject contract were submitted by plaintiff under a procurement procedure known as "Two-Step Formal Advertising." The first step of this two-step, formally advertised procurement was initiated by Letter Request for Technical Proposal (LRFTP), issued February 14, 1969. The LRFTP specified that those engines incorporated in the technical proposals had to be qualified and listed on a Qualified Products List. Defendant claims that under the contract as finally entered into, a separate proposal was stated for each engine configuration incorporated in the technical proposal. But defendant admits that the successful bidder's proposal became a part of the contract under the LRFTP.

The proposer was required to include a detailed bill of materials. The generators with the configuration of engines involved came under a configuration management and controls program ordered by a directive of the Department of Defense, issued July 17, 1968.[1] It was a new application. Defendant admits this. The transcript of testimony before the ASBCA consists of three volumes; most of the transcript is with relation to problems arising from the new application of configuration management and controls. We shall later refer to specific, uncontradicted testimony given in the lengthy transcript and specific provisions regarding bill of materials and other relevant provisions.

The "Statement of Work," which was later incorporated in the contract, in Article 1, required the contractor to furnish all engineering, labor, tools, equipment, materials, supplies, and services necessary to design, fabricate, assemble, test, and deliver items in accordance with the requirements of Attachment A, "Purchase Description." Within thirty days after award of the contract, the contractor had to submit to the contracting officer for approval scale drawings and data to describe completely the design and assembly of the generator and excitation systems. Thirty days thereafter, the same data was to be submitted for the complete generator sets. Approval of such data would indicate that no design defects were evident but defendant argues that this in no way relieved the

[1] This directive is more specifically referred to hereafter. It is an exhibit in this case.

contractor of responsibility for supplying equipment which met the requirements of Attachment A.

The "Statement of Work" contained Attachments A through U. Attachment A, which was a detailed purchase description of the generator sets, provided:

> 3. REQUIREMENTS
>
> * * * * *
>
> 3.11 *Engine.*—Except as otherwise specified in this Purchase Description, the engine shall be liquid-cooled conforming to MIL–E–11276.

Attachment L consisted of "drawings and/or part numbers for components required for use on DOD Tactical Generator Sets 15 KW through 300 KW." The engine was not listed as an Attachment L part. Any deviation from the parts listed in Attachment L required contracting officer approval.

On March 12, 1969, a pre-proposal conference was held, with representatives of plaintiff, Caterpillar, and Allis-Chalmers in attendance. An opening statement was made by an Air Force representative and it was followed by questions and answers. There were the usual questions and answers on technical matters relating to the generators. The statement covered general information and details. Printed copies of the statement and questions and answers were distributed. However, in the opening statement the Government's representative stated that the subject generator procurement was unique in that a "*formal Configuration Management Program*" on the part of both the Government and the contractor would be a "*major management discipline*" to be used throughout the contract. He admitted that this was a departure from the ordinary procurement of generators heretofore procured, but it was in accordance with recent Department of Defense directives.

On or about April 22, 1969, plaintiff sent a form letter to prospective engine suppliers asking them to furnish a technical proposal and price data in accordance with the referenced LRFTP. In addition, the form letter sought concurrence with the delivery requirements specified in the LRFTP. On April 27, 1969, plaintiff received a proposal from Caterpillar and later, a supplement. A proposal was also received from Allis-Chalmers. On or about June 2, 1969, plaintiff

received price proposals from Caterpillar and Allis-Chalmers which required further negotiation before they could be accepted. Between the time it submitted its technical proposal and the time it submitted its bill, plaintiff continued to receive delivery schedule data from the vendors.

On June 29, 1969, plaintiff submitted its technical proposal to the Government.[2] It included the four 100 KW and 200 KW combinations that could be made using Caterpillar and Allis-Chalmers engines. On September 24, 1969, the contracting officer wrote to plaintiff seeking clarification of its proposal. On October 9, 1969, plaintiff submitted an amendment to the technical proposal which in part expanded on its configuration management plan.

On November 4, 1969, plaintiff received notice from the contracting officer that its technical proposal was acceptable. This was followed in January, 1970, by receipt of four bid sets, each of which made reference to one of the four engine combinations by manufacturer's name and model number as set forth in plaintiff's technical proposal.

Bids were opened on April 3, 1970. Plaintiff selected Configuration No. 1, the Caterpillar engines, for the 100 and 200 KW generator sets, subject to the provisions of plaintiff's configuration plans as disclosed in its technical proposal.

On April 9 and 10, 1970, plaintiff received notice from Caterpillar that it could meet plaintiff's requested delivery of preproduction units 220 days after contract award and delivery of completed units 500 days after release of monthly production quantities. Plaintiff did not attempt to obtain more favorable delivery dates from Caterpillar although it did not consider the delivery schedule to be satisfactory. Plaintiff felt it could obtain a better schedule when it had an offer ready for award. On April 15, 1970, Caterpillar promised a better delivery schedule, 180 to 220 days after award for preproduction units and 90 to 120 days after release of monthly production quantities for completed units. Again, plaintiff felt this schedule was not totally satisfactory but it was hopeful for better terms after it received award of the prime contract. On April 14 and 15, 1970, a pre-award sur-

[2] At this point our description of plaintiff's technical proposal is brief but it is more specifically referred to hereafter in the opinion, where we recite the relevant portions of the proposal in the exact words used by plaintiff.

vey team met with plaintiff. Caterpillar's latest delivery schedule was acceptable to the Government's production people and the pre-award survey team.

Plaintiff was awarded the contract on May 14, 1970, effective June 1, 1970. The maximum dollar amount of the award was established for "administrative purposes only" as $31 million for three program years. The contract contained the standard General Provisions for fixed-price supply contracts including the following:

> * * * Clause 2, Changes, ASPR 7–103.2 (1958 JAN), and Clause 15, Disputes, ASPR 7–103.12(a) (1958 JAN). It also contained within the General Provisions Clause 40, Quality Program, ASPR 7–104.28 (1967 AUG); Clause 60, Correction of Deficiencies, ASPR 7–105.7(d); and Clause 65, Value Engineering Incentive, ASPR 7–104.44 and 7–104.44(c)(i) (1967 JUN).

General Provision, Clause 40, the Quality Program clause, required the quality program to be in accordance with specification MIL–Q–9858A. That specification required plaintiff to perform inspections, tests, and detailed record-keeping and also required plaintiff to decide which quality program or controls to pass on to its subcontractors.

A post-award meeting was held during the period of June 9 through 17, 1970. At that time the Government believed plaintiff could not move from the bill of materials in the technical proposal without submission of an Engineering Change Proposal (ECP). Plaintiff clearly stated that it believed that a movement from the bill was not a change in the specifications and if it was required to substitute an alternative source to meet its prime obligations, it could do so without Governmental approval. At the meeting, as a compromise, there was an agreement on the method of making engine changes under plaintiff's technical proposal. Instead of an ECP, plaintiff and the Government agreed that a Request for Technical Action (RTA) would be used. A change from Caterpillar to Allis-Chalmers engines was discussed in reference to the RTA procedure. Plaintiff stated to the contracting officer that it wanted flexibility to choose either Caterpillar or Allis-Chalmers engines, depending upon negotiations. Plaintiff believed that the change from Cater-

pillar to Allis-Chalmers would be acceptable on the RTA form as the Government had found the Allis-Chalmers engines technically acceptable when it had accepted plaintiff's technical proposal. It was clear that by agreeing to submit the RTA form plaintiff was still contending that defendant's approval was not required, it was only informational, and that defendant's representatives understood plaintiff's position. When RTA forms are hereafter mentioned, their submission by plaintiff is understood to be subject to the foregoing qualification. Plaintiff advised the Government that in order to meet the 60-day drawing requirement it was going to begin preparing a design around the Allis-Chalmers engine.

On June 19, 1970, plaintiff submitted an RTA, on a draft Condec form 4306. It requested approval of the Configuration 4 Allis-Chalmers engines as alternatives to Configuration 1 Caterpillar engines. The reason given for the request was to "permit negotiations to secure subcontract in accordance with contract obligations." No action was taken on this RTA.

Three days later, on June 22, 1970, plaintiff sent a TWX., designated as RTA 4306–0001, to the contracting officer requesting approval for plaintiff to give concurrent consideration to both engine suppliers for a negotiations period of five days, at which time only one approved supplier would be selected. No action was taken on this RTA as the Government's Configuration Control Board was told it would be withdrawn.

On July 6, 1970, plaintiff sent a third RTA to the contracting officer, this time requesting a change from Configuration 1 to Configuration 4. The stated reason was that plaintiff and Caterpillar were unable to reach agreement on terms, including correction of deficiencies and delay damages, without an increase in price, while Allis-Chalmers would meet all terms and conditions.

On July 8 and 10, 1970, the office of the Project Manager, Mobile Electric Power (PM–MEP) and the Air Force Aeronautical Systems Division, Wright-Patterson Air Force Base, both of which provided technical input for the project, recommended to the contracting officer disapproval of the

latest RTA because the prime contractor was responsible for correction of deficiencies and delay damages was a matter between the prime and subcontractor. PM–MEP noted in its recommendation a revised proposal would be considered if Caterpillar had made an unwarranted increase in price over that offered prior to contract award. The Aeronautical Systems Division noted in its recommendation that the Configuration 4 engines were technically acceptable.

On July 13, 1970, the contracting officer disapproved the RTA. Thereafter, Caterpillar informed plaintiff it was preparing a new quotation and had various objections to the terms of plaintiff's purchase order. It maintained the right to make production changes after preproduction approval without plaintiff's or the Government's approval and was only conditionally accepting a Correction of Deficiencies Clause. Due to production difficulties Caterpillar could not foresee delivery before December, 1970. On July 16, 1970, Caterpillar sent plaintiff a "completely revised quotation" which superseded all previous proposals.

On July 15, 1970, plaintiff prepared a new RTA, requesting approval to utilize Configuration 4 in lieu of Configuration 1, the chief reasons being that Caterpillar would not accept MIL–Q–9858A and, further, would not furnish a delivery schedule acceptable to plaintiff. On July 24, 1970, Caterpillar agreed to a firm delivery date of December 15, 1970, for 17 preproduction units with the exception of making delivery between November 15 and December 1, 1970, if it received notice to proceed not later than July 29, 1970. On July 29, 1970, the contracting officer disapproved the RTA. In his letter of rejection the contracting officer considered Caterpillar's proposed delivery date of December 15, 1970, to be adequate to meet the contract production delivery schedules.

After rejection of the July 15, 1970, RTA, Allis-Chalmers offered plaintiff a price reduction of up to 4 per cent of its proposed subcontract price for a waiver of MIL–Q–9858A. Plaintiff's vice president told the contracting officer that it was willing to pass on to the Government any savings realized from a change in engines. Plaintiff indicated that the savings would amount to approximately $112 per engine.

The contracting officer noted that cost or pricing data would be required.

On August 6, 1970, plaintiff submitted a cost reduction ECP. Plaintiff objected to the use of an ECP believing that matters of this type would be handled by an RTA. On August 11, 1970, plaintiff forwarded cost data incident to the ECP, providing for a cost reduction of $112 per unit for the 100 KW generator sets and $248 per unit for the 200KW sets, for a net savings to the Government of $86,332. On August 13 and 17, 1970, the Government recommended approval of the ECP. On August 20, 1970, the contracting officer disapproved the ECP.[3] Plaintiff asked for reconsideration and requested a final decision. On August 24, 1970, plaintiff notified the contracting officer it considered his August 20, 1970, TWX an order to utilize Caterpillar engines, thus denying plaintiff the opportunity of performing the contract in accordance with the contract provisions. Plaintiff stated it would comply with the contract as changed without prejudice to its right to claim a breach of contract or a constructive change.

Beginning in September, 1970, there began a debate between plaintiff and the Government, and among the various Government offices, on the acceptability of the generator sets with an engine produced by a subcontractor not utilizing MIL–Q–9858A. The focus of the debate was the contracting officer's July 29, 1970, TWX to plaintiff wherein the contracting officer stated that configuration control of engines beyond MIL–E–11276 was not required.

In May, 1971, plaintiff's Quality Assurance Director visited Caterpillar's plant and determined Caterpillar was not prepared to implement various essential features of MIL–Q–9858A which were in excess of those required under MIL–I–45208A. Plaintiff, however, was prepared to implement a number of these features with its personnel. The Director listed ten elements of MIL–Q–9858A which he felt were essential to assurance of continued contractual conformance by plaintiff. These ten elements were considered by plaintiff to be criteria for judging a subcontractor's compliance with

[3] The ECP was disapproved because the Government had calculated it was entitled to a reduction in the contract price in the amount of $600,000. Plaintiff responded that $112/$248 was its best and lowest offer.

MIL–Q–9858A, yet Caterpillar's proposal had made no reference to most or all of these items. The Director believed that Caterpillar's unwillingness to comply with these elements of MIL–Q–9858A made it "impossible" for plaintiff to administer the contract from a quality point of view. Plaintiff could not provide objective evidence of consistently conforming material or demonstrate the parts received met the requirements of the specifications without Caterpillar's compliance.

On February 18, 1971, plaintiff advised the contracting officer it would seek an equitable adjustment for costs occasioned by being forced to utilize Caterpillar engines. On March 29, 1971, plaintiff presented its claim, with supporting documentation, in the amount of $818,305. Therein, plaintiff alleged improper interference with its performance under a performance-type contract and wrongful contract interpretation beyond the scope of the contract as awarded.

On September 8, 1971, the contracting officer's final decision denied plaintiff's claim in its entirety. Plaintiff appealed to the ASBCA. On June 26, 1974, the ASBCA rendered a decision denying plaintiff's appeal. Thereafter, on October 8, 1974, plaintiff filed its original petition in this court.

The issue involved in this case is whether plaintiff was limited to furnishing engines manufactured by Caterpillar, designated in Configuration 1, during Step 2. As used herein, Step 1 begins with defendant's distribution of the LRFTP to contractors on February 14, 1969. Step 2 begins with the bid and contract award on May 14, 1970, and ends 330 days after contract award.

As a preliminary matter we mention that both parties agree that it is a question of law whether the totality of the request for proposals, plaintiff's proposal, and the resultant contract "froze" the contract's engine specifications at the time of award. *Ray D. Bolander Co.* v. *United States*, 186 Ct. Cl. 398 (1968); *Jamsar, Inc.* v. *United States*, 194 Ct. Cl. 819, 442 F. 2d 930 (1971); *Dynamics Corp.* v. *United States*, 182 Ct. Cl. 62, 389 F. 2d 424 (1968); *Merando, Inc.* v. *United States*, 201 Ct. Cl. 28, 475 F. 2d 603 (1973); *John McShain, Inc.* v. *United States*, 199 Ct. Cl. 364, 462 F. 2d 489 (1972). And, therefore, the decision of the ASBCA re-

garding the above-mentioned interpretation is not entitled to finality. This court is free to re-examine the contract language and independently reach its own conclusion. *Dana Corp.* v. *United States*, 200 Ct. Cl. 200, 470 F. 2d 1032 (1972); *Bishop Engineering Co.* v. *United States*, 180 Ct. Cl. 411 (1967); *Maxwell Dynamometer Co.* v. *United States*, 181 Ct. Cl. 607, 386 F. 2d 855 (1967); *Randolph Engineering Co.* v. *United States*, 176 Ct. Cl. 872, 367 F. 2d 425 (1966); *Thompson Ramo Wooldridge Inc.* v. *United States*, 175 Ct. Cl. 527, 361 F. 2d 222 (1966).

Since in the discussion to follow plaintiff's technical proposal submitted on June 29, 1969, is discussed extensively and in detail, the question arises as to whether plaintiff's technical proposal was a part of the contract. In the instant case the LRFTP stated as follows:

> * * * The successful bidder's proposal shall become a part of the contract * * *.

Therefore, plaintiff's technical proposal was clearly a part of the contract.

At this point we discuss *Jack Stone Co.* v. *United States*, 170 Ct. Cl. 281, 344 F. 2d 370 (1965), a case which both parties have discussed extensively in their respective briefs. We consider the case very pertinent. In that case Jack Stone Co. (hereafter Stone) entered into a contract with the General Services Administration (GSA) to modernize a fire alarm system. The existing system was of Sperti Faraday manufacture. The general conditions included in the contract specifications contained a provision, paragraph 1–19, entitled "Standard References," which stated that reference in the specifications to an item by name establishes a standard of quality and does not limit competition. The contract also provided that the contractor may make equal substitutions if approved in writing in advance by the contracting officer. Another paragraph of the specifications stated that all new equipment and parts furnished shall be of the same manufacturer of the existing system, Sperti Faraday. After entering into the contract, Stone submitted its list of material and shop drawings showing the use of equipment manufactured by American District Telegraph Company (ADT). Stone was advised that the material did not comply with the speci-

fications. Stone requested reconsideration. The contracting officer instructed Stone to use the Sperti Faraday equipment. Stone appealed the decision to the Administrator of the GSA and the appeal was heard by the GSA Board of Review. The appeal was denied. While the appeal was pending, Stone completed performance using Sperti Faraday products. Stone filed suit in this court seeking an equitable adjustment under the changes article because the contracting officer required Stone to install Sperti Faraday equipment rather than ADT equipment. The court decided with relation to the "Standard References" paragraph as follows:

> * * * It was designed to discourage the potentially monopolistic practice of demanding the use of brand-name or designated articles in government contract work. * * *
>
> * * * * *
>
> * * * The contracting officer does have to exercise judgment to determine whether the item proposed to be substituted is equal in quality and performance to the designated proprietary product, but his power does not extend to a refusal to allow a replacement which is equal in these respects. * * *
>
> * * * * *
>
> We see no reason why paragraph 1–19 should not be accorded its ordinary meaning in the present contract. All the references in the detailed specifications to Sperti Faraday equipment can be, and should be, "interpreted as establishing a standard of quality"—as paragraph 1–19 requires. In the light of that paragraph, there is no language (such as the phrase "Sperti Faraday *only*") suggesting anything other than a "standard of quality." Nor does the record show that the contracting officer or the specification writer had any dispensation to delete or modify that standard clause or to change the policy it incorporates. If the National Institutes of Health or the Public Buildings Service desired to assure that only Sperti Faraday material would be installed, they should have taken the necessary steps to omit or change paragraph 1–19. Since the clause was included *in toto* without any expressed qualification, it must be given its normal sphere of operation. *Cf. Kaiser Industries Corp.* v. *United States*, 169 Ct. Cl. 310, 323–24, 340 F. 2d 322 (1965); *Pfotzer* v. *United States*, 111 Ct. Cl. 184, 226, 77 F. Supp. 390, 399–400 (1948), *cert. denied*, 335 U.S. 885 (1948); *Loftis* v. *United States*, 110 Ct. Cl. 551, 629,

76 F. Supp. 816, 826 (1948). [Footnote omitted.] [170 Ct. Cl. 287–88, 344 F. 2d 373–75.]

In *Jack Stone Co.* we held under the circumstances in that case that specific references in a contract to a brand name, Sperti Faraday, only established a standard of quality and that a product of equal quality, manufactured by American District Telegraph, may be substituted. Plaintiff relies on *Jack Stone Co.* and claims that under all the circumstances of this case, with relation to engine combination, the combination by Caterpillar first designated by plaintiff did not preclude later substitution of the Allis-Chalmers engine combination since both engines were on defendant's Qualified Products List.[4]

We now discuss an important aspect of this case which the ASBCA chose not to decide. The ASBCA stated as follows in its decision at footnote 4:

> There has been considerable argument over whether appellant submitted one technical proposal with four engine combinations, or four separate technical proposals. However, a determination of one or the other is not necessary to the outcome of this decision. Only one part or source could be placed in a bill of materials list for each item, and the instructions to the Letter Request for Technical Proposal stated that a separate proposal was necessary for each engine incorporated. Appellant felt it needed a separate proposal for each engine (Tr. 1–67). For ease of reference, we will describe appellant's 29 June submission as its "technical proposal", with four engine configurations.

A relevant portion of the technical proposal submitted by plaintiff to the Government on June 29, 1969, stated in regard to selection of the 100 KW and 200 KW engines as follows:

> We have included separate engine proposals as permitted by paragraph III of LRFTP.
>
> We have included in Section 8.4 two possible engine selections for each of the 100 Kilowatt and 200 Kilowatt size units.
>
> We have described in Section 8.7 our selection of Major Components for this Program.

[4] See, also, *Meva Corp. v. United States*, 206 Ct. Cl. 203, 511 F. 2d 548 (1975).

The separate engine proposals we are making are in accordance with the instruction and explicit understanding of the Letter Request for Technical Proposal.

The separate engine "family" proposal possible combinations are:

(1) Cat. Model D33T—100 KW and Cat. Model D343TA—200 KW.
(2) Cat. Model D333T—100 KW and Allis-Chalmers Model 25000—200 KW.
(3) Allis-Chalmers Model 11000—100 KW and Cat. Model D343TA—200 KW.
(4) Allis-Chalmers Model 11000—100 KW and Allis-Chalmers Model 25000—200 KW.

The final choice of the engine "family" combination to be utilized in Step II of this procurement will be made by Con-Diesel based on qualification status at that time and other pertinent engine factors. [This clause will be hereafter referred to as plaintiff's "option clause."] [Footnote omitted.]

Plaintiff proposed four engine combinations with plaintiff's option clause because it wanted to maintain the widest possible latitude, to enable it to get the best price prior to its submission on Step 2. On September 24, 1969, the contracting officer wrote plaintiff, seeking clarification of plaintiff's proposal on various points, including baseline control during the development cycle and the control of baselines through configuration management. On October 9, 1969, plaintiff submitted its "Amendment" to the technical proposal, which, in part, expanded on its "configuration management plan." Plaintiff points to statements in Section 4 of the amendment as providing the primary contractual basis for its freedom to furnish either Caterpillar or Allis-Chalmers engines. Section 4 provided:

Baseline Control

During the development cycle the Project Engineer is responsible for initiating changes to the design drawings, in accordance with changes generated by the testing program, and manufacture of first articles. These changes will take the form of engineering drawing releases or drawing changes, which will be reviewed by the CCB [5] to insure compliance with specification and contract requirements.

[5] Plaintiff's internal Configuration Control Board. [Footnote added by the court.]

> As indicated in the "Schedule of Engineering Data Submittal" Chart in Section 2.11, our Company will commence submitting drawings for Government approval 220 days after Contract Award. The last drawings are scheduled to be submitted 330 days ARO [after contract award]. However, any design changes occurring between the 330 day to 420 day period will require ECP's [Engineering Change Proposal] to be submitted to the Government for approval.
>
> All design drawings will be under control of the CCB from the preparation of the first drawing to the time of production release by the Government (550 days ARO), and continuing to completion of the program.

We think that the ASBCA erred in refusing to decide as a preliminary issue whether plaintiff's technical proposal was one technical proposal with four engine combinations or four separate technical proposals. The ASBCA eviscerated plaintiff's option clause from the bowels of the main controversy in this case. Plaintiff's option clause in its technical proposal read as follows:

> The final choice of the engine "family" combination to be utilized in Step II of this procurement, will be made by Con-Diesel based on qualification status at that time and other pertinent engine factors.

Plaintiff's option clause would be nullified if plaintiff's technical proposal is interpreted as four separate technical proposals. If a list of items to be chosen by option is separated and each item is considered as being separate, the option becomes meaningless. Therefore, plaintiff's option clause would be viable only if plaintiff's proposal is interpreted as one technical proposal with four combinations. For then there is a list of four combinations from which plaintiff may choose. It was vital to the main issue in this case for the ASBCA to decide the question whether the technical proposal was one technical proposal with four engine combinations or four separate technical proposals. But the ASBCA stated that the determination was not necessary because:

> * * * Only one part or source could be placed in a bill of materials list for each item, and the instructions to the Letter Request for Technical Proposal stated that a separate proposal was necessary for each engine incorporated. * * *

The ASBCA in deciding preliminarily that a determination was not necessary did not consider the portion of defendant's LRFTP which stated that the successful bidder's technical proposal "shall become a part of the contract." If plaintiff's technical proposal as submitted was one technical proposal with four engine combinations, plaintiff's option clause became a part of the contract. The ASBCA by choosing not to decide whether plaintiff's proposal is one proposal with four engine combinations or four separate proposals in effect deprived plaintiff of its rights under the option clause because as hereafter shown, plaintiff's technical proposal was clearly one proposal with four engine combinations.

Was plaintiff's technical proposal one proposal with four engine combinations or four separate technical proposals? In framing the alternatives, we believe that the ASBCA abbreviated the alternatives and it really meant the following: Was plaintiff's technical proposal one proposal of four engine combinations *with plaintiff's option clause* or four separate proposals?

In deciding the question we deem it pertinent that after plaintiff's technical proposal was received by the Government, plaintiff was notified that a clarification was required. The clarification was requested under the following section of defendant's LRFTP:

> J. Technical proposals submitted in response to this request should be fully and clearly acceptable without additional explanation or information, since the Government may make a final determination as to whether a proposal is acceptable or unacceptable solely on the basis of the proposal as submitted and proceed with the second step without requesting further information from any offeror; however, if the Government deems it necessary to obtain sufficient acceptable proposals to assure adequate price competition in the second step or deems it otherwise desirable in its best interest, the Government may, in its sole discretion, request additional information from any offerors of proposals which the Government considers reasonably susceptible of being made acceptable by additional information clarifying or supplementing but not basically changing any proposal as submitted, and for this purpose, the Government may discuss any such proposal with the offeror.

Therefore, defendant had doubts as to what plaintiff's technical proposal meant. Paragraph J permitted this explanatory procedure only "to assure adequate price competition * * * or deems it otherwise desirable in its [the Government's] best interest, * * *." Since this was the first time the Air Force Mobile Electric Power unit applied configuration management principles to a generator procurement procedure and the Government's LRFTP did not give any guidelines, the "Baseline" descriptions in Section 4 of plaintiff's clarification were critical. This Section 4 clarification was the only place in all of the papers leading to the contract where baseline description, usually associated with configuration management and control, was described. After reading Section 4 the Government must have concluded that price competition was preserved to its satisfaction and that it was desirable and in the Government's best interest. Plaintiff's "Baseline Control" explanation in Section 4 clearly explained what plaintiff meant in its technical proposal by its option clause. Defendant cannot now be heard to say that it misunderstood what plaintiff meant because defendant's LRFTP further provided as follows:

> H. If an offeror submits an unacceptable technical proposal under step one, he will be so notified in writing upon completion of the technical evaluation.

Instead of rejecting plaintiff's technical proposal, defendant approved the proposal. Acceptance of plaintiff's technical proposal was significant in that defendant's LRFTP also provided as follows:

> G. In the second step of this procurement, only bids based upon technical proposals *determined to be acceptable* under step one will be considered for award, and each bid in the second step must be based on the bidders' own technical proposals. [Emphasis supplied.]

In other words, the *accepted technical proposal* became the basis of plaintiff's bid. Plaintiff submitted its bid based on its technical proposal approved by defendant. It was awarded the contract on May 14, 1970, effective June 1, 1970.

Having fully explained the circumstances relating to defendant's acceptance of plaintiff's technical proposal and plaintiff's bid based thereon, we return to the question of

whether it was one proposal of four engine combinations with plaintiff's option clause or four separate proposals. Defendant's reason for arguing that plaintiff's technical proposal amounted to four separate proposals is defendant's LRFTP Instructions for Preparing Technical Proposals, dated January 28, 1969. It argues that the said instructions contained the following provisions:

> I. GENERAL [paragraph 5, page 1]
> The successful bidder's proposal shall become a part of the contract, and, therefore, all lists of materials and statements made in the proposal shall become binding on the contractor and shall not be altered without prior approval of the Contracting Officer.
>
> * * * * *
>
> III. TECHNICAL APPROACH [paragraph 1e, page 4]
> Include a detailed bill of materials for each class, mode, and size of preproduction set covered by the RFTP, listing all parts by name, part number, and manufacturer. The applicable division within a company shall be indicated for those manufacturers having a corporate structure. Only one source shall be listed for each part. The parts shall be arranged in descending order of assemblies, subassemblies, and components. Standard hardware, such as fasteners, screws, nuts and bolts, need not be listed. These lists in no way affect nor do they substitute for any listings required by a contract resulting from this RFTP.

Amendment No. 2 to the LRFTP, dated April 9, 1969, at Section III, page 4, stipulated:

> Proposers may submit proposals based upon engines in either or both these categories. A separate proposal is necessary for each engine incorporated and only one proposal for each of the above categories may be submitted.

Defendant argues that under the above provisions, since each engine combination is a separate proposal, prior consent of the contracting officer must be obtained before other engines are substituted for engines manufactured by Caterpillar.

Plaintiff's answering argument is that plaintiff bid to its accepted technical proposal with the incorporation of the Caterpillar engine into its material list completing its bill of material list in Step 1. Only by going to that material list

with the Configuration 1 designation could anyone determine the engine selected. The plaintiff's technical proposal had been accepted by the contracting officer on this basis. The contract provisions incorporated into the contract and as set forth in Step 2 clearly did not require that the contractor utilize the specific engine set forth in the material list, unless the engine was included in approved drawings accepted by the contracting officer 330 days after receipt of order. In short, plaintiff relies on its option clause as clarified by it in Section 4 of the baseline clarification heretofore quoted in full. This was all a part of the configuration management proposal incorporated into plaintiff's technical proposal. The configuration management proposal was a requirement defendant specifically requested to be incorporated in the technical proposal. Plaintiff strongly argues that defendant cannot ignore it because it is binding on plaintiff as a part of the contract, so it is also binding on defendant.

So the question is, what is controlling? The provisions cited by defendant or plaintiff's option clause in its technical proposal, as further clarified by Section 4 of plaintiff's clarification heretofore quoted?

Plaintiff also clarifies the following amendment to the LRFTP which defendant contends is also material:

> Proposers may submit proposals based upon engines in either or both these categories. A separate proposal is necessary for each engine incorporated and only one proposal for each of the above categories may be submitted.

Plaintiff states that the amendment is of no significance in arriving at the plaintiff's intent in submitting alternative engine selections. The above merely permits offerors to submit multiple technical proposals respecting engines. Plaintiff argues that although defendant contends that the plaintiff submitted and was offered the opportunity to bid against four technical proposals, that is not precisely what occurred. Plaintiff's argument is that it submitted one technical proposal with four alternate engine selection combinations. The plaintiff's proposal contained one bill of material list showing each part that goes into each of the generator sets involved, with differences, if any, noted on the list be-

tween the different sets. There was only one part allowed in the bill of material for each item, including the engine. There was no separate complete bill of material submitted for each of the four different engine combinations. Where the engine was set forth in the list, the description of material column showed the words "See Proposal Section," which referenced the four different combinations set forth in the proposal. In effect, the plaintiff says it submitted one technical proposal with four different engine combinations.

Plaintiff has also presented the following additional reasons to show that its position that the technical proposal was a single proposal with four engine combinations with plaintiff's option clause, which allowed plaintiff to substitute engines during the Step 2 period, is correct:

> 1) Defendant's request for proposals stated very clearly that defendant desired inclusion in the generator sets of an engine which conformed to a certain specification (MIL–E–11276) and which was liquid-cooled. The only restriction was that the engine selected by the contractor must be one which had been qualified and was included on a certain Qualified Products List (QPL). There were engines on the QPL manufactured by three companies, including Caterpillar and Allis-Chalmers. The foregoing language leads to the conclusion that (a) defendant was satisfied with any one of the engines listed and manufacturers listed and (b) the choice was entirely that of the contractor.
>
> 2) Defendant contemplated that prospective contractors would desire to leave open their options with regard to which of the functionally interchangeable engines would be included in the generator set. This contemplation is evidenced by the permission extended in the request for proposals allowing prospective contractors to submit a proposal with separate engine proposals. This was defendant's way of being informed about the alternates proposed.
>
> 3) There is no explanation in the record of why defendant sent four separate invitations for bids to plaintiff (in Step 2), each differing only with regard to the engine combinations selected as alternates by plaintiff. Defendant has never argued that this was for the purpose of "freezing" the engine choice at the time of award. Nor is this a logical antecedent purpose, considering that the preproduction testing cycle was programmed for more than 550 days. This was much more than ample

time to switch engines three or four times, *particularly* when the engines were designated by manufacturer and part number in the QPL. These were tantamount to off-the-shelf items.[6]

4) The request for proposals included an Attachment L. On Attachment L there was a list of components by make and part number. There was also a provision that no substitute makes or part numbers could be used without advance approval of the contracting officer. If there were some reasonable excuse for wanting to freeze the engine part number at the time of award (proposal, really), it would have been a simple matter for defendant to include the engine in Attachment L, or provide that after prospective contractors elected an engine, the make and part number would be considered to be included in Attachment L. The engine was *not* included in Attachment L.

5) The only control on the change in the engine in the contract was after design drawing approval 330 days after contract award, as was incorporated in the following paragraph of the Statement of Work:

"aa. The Government recognizes the necessity of making production changes to QPL engines after the prototype generator sets have been tested, accepted and released for production. To insure set compatibility, the Government reserves the right to review, approve, or disapprove such changes prior to their incorporation in production engines. If the engine is subcontracted, prior to award of the subcontract, Government approval of the subcontract is required to insure that the requirements herein have been included."

6) The question arises, did anything become "frozen" with respect to the engines at the time of award of the prime contract? The contract price for the generator sets became frozen. Thereafter, having assumed 100 per cent of the cost-risk, as contractors do in firm fixed-price contracts, plaintiff could not change its mind about the engine at the defendant's expense. In other words, plaintiff could select another conforming engine but it could not demand that the defendant pay any increased cost resulting from the switch. By the same token, the price being frozen, the defendant is not entitled to any contract price reduction if a conforming engine other than that mentioned in the award document is used.

[6] With relation to the four bid sets sent to plaintiff by defendant, plaintiff adduced testimony that it would not be advisable to put in more than one bid, meaning that it would be self-defeating to put in four bids. Defendant has not answered this testimony at all.

At this point we refer to the testimony of Joseph Sullivan, defendant's chief witness. We deem his testimony material. He stated that he was employed at Fort Belvoir and worked for the Department of Defense as Project Manager, Mobile Electric Power (MEP) unit. His position was Chief of the Configuration Management Division. He was also Chairman of the Configuration Control Board of the MEP unit. He was graduated in 1915 as a geological engineer from the Colorado School of Mines. He spent most of his early years as an engineer in the oil business, including considerable time in Venezuela as an employee of Gulf Oil Company. He returned from his Venezuelan assignment in 1968 to the Virginia area and started working for defendant's MEP unit. He was in charge of the standardization program, especially in the area of documentation in the Project Manager's office. He had no prior experience as a contracting officer. He took a short six-month's leave to work with the Advanced Material Concepts Agency. This was from January through July, 1969 (the LRFTP was sent out by defendant on February 14, 1969; pre-proposal conference was held on March 12, 1969; plaintiff's technical proposal was submitted on June 29, 1969). After returning from the said agency assignment, he assumed the position as Chief of the Configuration Management office. It appears that while he was away with the said agency, there was a decision to apply configuration management and control to the project involved in this case. He testified that in addition to the machines developed in this case, there were other smaller sets to which configuration management was to be applied so there was much work to be done. When asked whether any instructions or information were disseminated to prospective bidders regarding the configuration management control, he answered as follows:

> Yes. There were two things. The problem really presented to us was one of "How do you get this information across to the contractors?" This is difficult. This is a formal system. Configuration management in our parlance was new.
>
> This was a new approach to configuration management, that is, at the DOD level. It had never been done this way before. * * *

He testified that Colonel Rochfort informed the bidders regarding configuration management at the pre-proposal meeting. The Colonel's remarks and the questions and answers which followed with relation to configuration management and control are given in the margin.[7] He admitted

[7] The material portions of Colonel Rochfort's instructions and questions and answers were the following:

In the instructions:

"I would like to take this opportunity to very briefly address four areas which we are putting a great deal of emphasis on in this procurement. These areas are: reliability; quality assurance; *configuration management;* and maintainability. We have departed from the normal engine generator procurement in these areas because we feel that additional effort must be expended if we are to have the type sets the DOD needs. [Emphasis supplied.]

"In the category of configuration management, we are requiring a formal Configuration Management Program on the part of both the contractor and the Government and this will be a major management discipline to be used throughout the contract. This Configuration Management Program is *truly unique in the procurement of engine generator sets and deserves considerable attention being given to this* effort in the submission of your RFTPs. Emphasis will be placed during our evaluation on how you propose to establish and administer your program. Your attention is invited to the following specific requirements which must be included in your submission. [Emphasis supplied.]

"First, you must relate to the Contracting Officer your understanding of the Configuration Plan. Your plan must recognize a system to provide for prompt detection of potential configuration discrepancies or incompatibilities as well as for effecting timely corrective action.

"Your Configuration Control Board must be chaired by a responsible company official.

"Your plan must clearly identify the organizational elements within your firm that will be influenced by configuration management prior to preparation of the flow chart for the Configuration Control Board functions.

"Most importantly, your plan must show the procedures you intend for control of your subcontractors and vendors. Basically, your subcontractors must be subject to the same depth of control by you as you will be by the Government. As I mentioned before, this is new to generator procurements but is completely in accordance with recent DOD directives and instructions on this subject." [Emphasis supplied.]

In the questions and answers:

Q. "Will a material review board (as defined in ASPR) be considered in a contract resulting from an acceptable proposal?

A. "Yes. A review board will be considered in conjunction with configuration management of the contract.

Q. "What does the Government's management plan for this procurement consist of?

A. "Contract management will be in accord with the current procedures in effect for the Military Services. Technical management will be in accord with the finalized Configuration Management procedures, which will be forthcoming from this RFTP.

Q. "What company or companies can supply the required technical information within the required time frame of this RFTP?

A. "The information cannot be supplied at this time.

Q. "Clearly define the implication and meaning of 'The Government will exercise design control * * *.'

A. "Design control will be via configuration management procedures. The Government considers the intent to be clear. Specific questions will be entertained."

that configuration management control as applied to engine generators was new and that they were testing the configuration control programs as applied to generators about the time the LRFTP was issued in this case on February 14, 1969.[8] The procedures were developed in a very informal manner. He stated that the LRFTP issued in this case did not state that the bidder had to meet any particular specification with respect to configuration management or control. He admitted that there was a guideline document under which defendant operated, called Mil Standard 480, which provided as follows:

> Contracts invoking this standard will specifically define base line, documentation and change control requirements consistent with the scope of the program and the complexity of the item being procured.

When asked where in the contract was there any reference to an allocated baseline, he answered that it was only in plaintiff's technical proposal. He testified as follows:

> Now, within the contract, when you are looking for the requirements for control, configuration control, what

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[8] Department of Defense Directive 5010.19, issued July 17, 1968, relating to configuration management and consisting of eight pages with a three-page attachment, described configuration management as follows:

"B. *Configuration Management.* A discipline applying technical and administrative direction and surveillance to (1) identify and document the functional and physical characteristics of a configuration item, (2) *control changes to those characteristics,* and (3) record and report change processing and implementation status." [Emphasis supplied.]

With relation to procurement aspects, it read:

"7. *Procurement Aspects.* DOD Components shall assure that appropriate provisions for configuration management are included in all contracts (or equivalent in-house agreements) for the development, production, modification and maintenance of CI's [Configuration Item]. Procurement planning and contract practices must be responsive to configuration management requirements."

It provided that each Department of Defense Component "shall implement this Directive within 90 days [by October 17, 1968] and shall forward three (3) copies of each implementing document to the Director of Defense Research and Engineering and to the Assistant Secretary of Defense (Installations and Logistics)."

In accordance with the directive, a "Joint Operating Procedure, Management and Standardization of Mobile Electric Power Generating Sources," dated March 30, 1970, consisting of 27 pages taken out of a looseleaf type of book, was developed and Chapter 7 therein related to "Configuration and Data Management." This document is in evidence as an exhibit. Witness Sullivan constantly referred to this Chapter 7 in his testimony before the ASBCA in September, 1972. It is significant that the LRFTP in this case was issued February 14, 1969; plaintiff filed its technical proposal on June 29, 1969; and the clarification was sent by plaintiff to defendant on October 9, 1969. Bids were opened on April 3, 1970.

you have to do is to be able to identify those sections which actually cover configuration management, or the aspects insofar as configuration control is applied to specific parts within the generator sets themselves.

Now, starting from the beginning of the document, of course, the first one, and most important to us, is putting the technical proposal itself in the contract. *When that occurred, the configuration management description that the contractor had prepared in response to the LRFTP became part of the contract.* This includes the definitions that we are trying to talk about. [Emphasis supplied.]

* * * * *

Q. Where else in the contract do you feel that it states that the contractor's technical proposal is part of a designated base line in that contract?

A. *Those specific words don't appear in the rest of the contract.* Except for that paragraph, those words don't appear. [Emphasis supplied.]

And with relation to configuration controls on engines, he testified:

Q. If configuration was so important in your program prior to that point, why did you not require that control be put on the engine before the period that the engines were tested or incorporated or approved?

A. You have to go back to the section of the QPL engine and the QPL document, and what it contains. If I had the document, I think I could demonstrate a little more easily than trying to describe it.

But essentially, what happens is, when an engine is QPL, the Government and the contractor together select a series of critical components and they publish the list of critical components within the QPL document itself, such as the QPL describes the engine and its characteristics, and then right behind that a complete listing of all those items that are critical insofar as the operation of that engine is concerned.

Consequently, the control on a QPL engine which the Government exercises is the control provided by the QPL at that stage, so the control was there. We didn't have to do anything. It came with the engine. [Emphasis supplied.]

We shall later refer to the foregoing answer regarding engine control.

Defendant argued that the "NOTICE" provision provided that it was plaintiff's contractual obligation to provide

Caterpillar engines and no others. That provision refers to equipment to be furnished in accordance with Configuration 1 and assumes that there are four separate configurations. Defendant states that the Government has a right to insist on the materials specified. Defendant refers to cases cited by the Government in *Jack Stone Co.* v. *United States*, *supra*, for the proposition that the Government is entitled to get what it contracts for. *Farwell Co.* v. *United States*, 137 Ct. Cl. 832, 148 F. Supp. 947 (1957); *Henry Spen and Co.* v. *United States*, 139 Ct. Cl. 613, 153 F. Supp. 407 (1957); and *Octagon Process, Inc.* v. *United States*, 141 Ct. Cl. 599 (1958). This court considered these cases inapposite in *Jack Stone*. We also consider them inapposite in the instant case. Defendant relies mainly on the LRFTP Instructions for Preparing Technical Proposals and "Technical Approach" paragraphs which we have heretofore recited in the earlier part of this opinion. It also relies on statements by some of plaintiff's witnesses that there were four proposals. But contracting officer Jack Metz, one of defendant's chief witnesses, also testified that plaintiff submitted "under one proposal or under one cover a variation of engine configurations." We do not deem it decisive whether one witness or another, whether plaintiff's or defendant's, used the plural or singular in testifying about the proposal because the very nature of the present procurement involved four engine configurations, with each configuration itself involving two separate engines. There were subproposals in a proposal. It was difficult to draw a line between singular and plural under the circumstances of this case when discussing proposal, proposals, engine, engines, configurations, and combinations. We base our decision on more substantial reasons.

We think it is important in deciding this case that it is undisputed that the MEP unit of the Air Force involved in this case was attempting to incorporate new concepts, configuration management and controls, in the present procurement of generators, in accordance with a Department of Defense directive issued in July, 1968. It was the first time the MEP unit applied configuration management and controls to this type of procurement. The "parlance was new," as chairman Joseph Sullivan of the unit's Configuration

Control Board testified. In early 1969 application of configuration management and controls to the present type of procurement was still in the experimental stage. Defendant's MEP unit was clearly not ready for such application. This was apparent at the time of the meeting of prospective bidders when the LRFTPs were issued. Colonel Rochfort stated in his questions and answers that the configuration control procedures will be forthcoming. On the other hand, bidders were told that there would be configuration management and controls involved in the contract and that these controls were one of the important factors to consider in the present procurement. But the contractors at the meeting were not given anything specific. It is a difficult concept even with guidelines.[9] Instead of providing guidelines for configuration management and controls in its LRFTP in the present case, the Government mailed its LRFTP without any mention of configuration management or control requirements. Colonel Rochfort's scant information supplied was clearly inadequate. Chairman Sullivan admitted that he did not read the LRFTP before it was sent out because he was at another agency for six months. The evidence does not disclose whether anyone carefully checked the LRFTP, which included by reference the two provisions defendant relies on for possible conflicts with the configuration management and controls proposed. Chairman Joseph Sullivan and contracting officer Jack Metz, defendant's only witnesses, who testified with relation to configuration management and controls, admitted that after the bids were in and the contract let out to plaintiff, the only place in the entire contract (which includes the

[9] Configuration management is referred to in the introduction of an Air Force publication entitled "Configuration Management Practices for Systems, Equipment, Munitions and Computer Programs," dated December 31, 1970, as follows:

"3.1 *Introduction.* Configuration management is a discipline applying technical and administrative direction and surveillance to (a) identify and document the functional and physical characteristics of a configuration item, (b) *control changes to those characteristics,* and (c) *record and report change processing and implementation status.* Configuration management is thus the means through which the integrity and continuity of the design, engineering and cost trade-off decisions made between technical performance, producibility, operability, and supportability are recorded, communicated, and controlled by program and function managers." [Emphasis supplied.]

The publication in 119 pages further defines and provides for its application. This publication is not in evidence but we take notice of it as a public document.

LRFTP and plaintiff's technical proposal and bid) where any specific mention of configuration management and controls was made was in plaintiff's technical proposal and in its clarification. The material portions are as follows:

> The *final choice of the engine "family" combination to be utilized in Step II of this procurement, will be made by Con Diesel based on qualification status at that time and other pertinent engine factors.* [Emphasis supplied.]

And in the clarification:

> *Baseline Control*
>
> During the development cycle the Project Engineer is responsible for initiating changes to the design drawings, in accordance with changes generated by the testing program, and manufacture of first articles. These changes will take the form of engineering drawing releases or drawing changes, which will be reviewed by the CCB [10] to insure compliance with specification and contract requirements.
>
> As indicated in the "Schedule of Engineering Data Submittal" Chart in Section 2.11, our Company will commence submitting drawings for Government approval 220 days after Contract Award. The last drawings are scheduled to be submitted 330 days ARO [after contract award]. However, any design changes occurring between the 330 day to 420 day period will require ECP's [Engineering Change Proposal] to be submitted to the Government for approval.
>
> All design drawings will be under control of the CCB from the preparation of the first drawing to the time of production release by the Government (550 days ARO), and continuing to completion of the program.

We have fully considered the circumstances under which defendant accepted plaintiff's technical proposal. Plaintiff was awarded the contract. The configuration management and control provisions above quoted became a part of the contract. There are six reasons given by plaintiff why it had a right to choose engines in Configuration 4 (Allis-Chalmers) during Step 2. We fully agree with plaintiff and find that the reasons are cogent. We also find that defendant's chief witness Joseph Sullivan's admission, heretofore re-

[10] Plaintiff's Internal Configuration Control Board. [Footnote added by the court.]

cited in length, that "*the control on a QPL engine which the Government exercises is the control provided by the QPL at that stage, so the control was there. We didn't have to do anything. It came with the engine.*" [Emphasis supplied.] is highly prejudicial to the defendant. Witness Joseph Sullivan's admission is that of the chairman of the Configuration Control Board having jurisdiction over the present procurement and Chief of the Configuration Management Division of the MEP unit. He referred to himself as the chairman who is "judge and jury and I am the judge and jury in this case." We do not take his statement regarding engine control lightly. His admission clearly corroborates plaintiff's position taken in this case that configuration management and control provisions with plaintiff's option clause in its technical proposal and clarification thereof above quoted gave plaintiff a choice of engines to substitute. The chairman's said admission also strongly corroborates the six reasons plaintiff submitted in support of its position. We have listed the six reasons heretofore in this opinion.

We are also aware and consider important the query raised by plaintiff's witness that if defendant's interpretation that there were four separate proposals is correct, would any contractor bid four separate proposals? Plaintiff suggests that as a practical matter a single bidder submitting four bids would then be competing against itself. The four bids would be self defeating. Although raised in the record of this case, this query has remained unanswered by defendant. In other words, the defendant's four-separate-proposals view results in a highly impractical and self-defeating interpretation. Furthermore, plaintiff's witness Howard Weissman testified as follows:

> Q. Why didn't CONDEC submit more than one proproposal in the second step and why didn't CONDEC submit a bid for more than one of the acceptable engine configurations in the second set.
>
> A. There were two reasons. One we felt that only one could be the lowest responsive bid.
>
> Two, we discussed this problem with the CO, who pointed out a background of heavy protest action on all of these generator contracts. He suggested and I took the advice to submit a clean with nobody coming in otherwise they would never be able to award any contract under this program of family generator program.

The "CO" was identified as Mr. Metz, the contracting officer in the present case. Mr. Metz, who took the witness stand thereafter, did not deny the foregoing testimony. It meant that defendant's interpretation of four separate bids by plaintiff might lead to lawsuits by protesting bidders. Here again, the opinion of the contracting officer cannot be ignored. We can picture the confusion four bids would cause because plaintiff would still insist on a right of substitution with each bid under its option clause in the technical proposal.

We also find that the development of the informal RTA form on plaintiff's "Condec" forms by plaintiff's witness Weissman and defendant's representatives was evidence that engine changes did not come under the ECP and that an ECP was not required. The undisputed testimony by witness Weissman was as follows:

> At that point Mr. Sullivan who was the configuration manager for the project manager's office asserted that in his opinion we could not move away from the bill of materials contained in our technical proposal without submitting an ECP.
>
> My contention was that there was no change in specifications. I contended that we had a prime responsibility to satisfy the terms of our obligations under the contract and while we would try to meet our obligations with our selected sources, if at any time we were required to move out to an alternate source of supply we should be able to do it without securing government approval.
>
> This of course raised a considerable argument. I posed the question to Mr. Metz, if the government was insisting that we were to design this item strictly adhering to our technical proposal and even if our technical proposal contained components that were not designed or components that could not perform was he at that time stating that the government was adopting our technical proposal as part of the specification.
>
> He indicated not at all. He contended that the contractor was responsible for the performance specification. So therefore I contended I should have the full and free right to move in the direction of trying to comply with the specifications without securing government approval or government direction of which way I would secure the objective of meeting the specifications.
>
> At this point in time the government apparently caucused. *They came back with a conversation wherein*

Mr. Sullivan indicated that he required knowledge of where we were moving from our technical proposal so that he could record the movements of the parts from our technical proposal to what ultimately would be the product base line.

We agreed as an accommodation that we would pass on to him the same kind of information that was moving internally from the point of view of our own internal configuration control and that we would provide it in the form of an RTA.

We specifically distinguished the form and called it an RTA since we did not accept the fact that it could be considered an ECP since we did not recognize that a change in specification was taking place.

What we were doing we were attempting to meet the specification. *At that point in time the government, Mr. Sullivan, Mr. Kramer, the technical personnel present, Mr. Metz agreed that the RTA would be the document wherein we would advise the government what we were doing in the way of changing parts to meet the specification.*

A. It was agreed that this would be an informational type no cost document. I had only one last item that I had to get cleared. And I asked Mr. Metz what would be the criteria for acceptance of an RTA.

The answer that was given was provided the item that you were substituting met the performance requirements and was technically acceptable to the government. There had been no reason why such RTA would not be approved.

I then posed a question to Mr. Kramer, "*Since the engine namely, the Allis-Chalmers engine as well as Caterpillar engine had previously been submitted to the government for technical evaluation since the government had accepted it technically, I guess there was no reason why I could not be approved to substitute the Allis-Chalmers engine in the event that I could not get an acceptable subcontract from Caterpillar.*

It was generally agreed that there were no technical exceptions to Allis-Chalmers since they had already been approved.

We were advised to submit this RTA as quickly as possible. It was our impression, all parties to the contract were of the impression that we would have no difficulty in securing approval of the government.

Q. Are those same people in this room today?

A. Yes, they are.

Q. Who is it [sic]?

A. Mr. Metz was there; Mr. Guthrie was there. Mr. Sullivan was there. Mr. Kramer was there. I don't know about the others.

[Emphasis supplied.]

Witness Joseph Sullivan testified with relation to the RTA form that he agreed with witness Weissman's description that it was informational. Witness Weissman's testimony was not contradicted by any of the parties present at the time of the conversation. We find that the reasons given for the adoption of the RTA form and its use and acceptance by all concerned, including the contracting officer, show that the obtaining of consent to the changing of engines from one configuration was really not necessary. Otherwise, the official ECP forms would have been necessary. It all, again, substantiates plaintiff's position that no consent to the change was necessary.

We, therefore, answer the question we have asked. Was plaintiff's technical proposal one proposal of four engine combinations *with plaintiff's option clause* or four separate proposals? It is our opinion that plaintiff's technical proposal was *one proposal of four engine combinations with plaintiff's option clause.* Plaintiff's configuration management and control plan spelled out in its technical proposal and the clarification was incorporated into the contract. The contract did not require that the contractor utilize Caterpillar manufactured engines, as set forth as Configuration 1, exclusively. It had the option of utilizing the remaining engine combinations 2, 3, or 4 during the Step 2 period.

Having answered the question, we now turn to the following LRFTP Instructions for Preparing Technical Proposals:

I. GENERAL [paragraph 5, page 1]

The successful bidder's proposal shall become a part of the contract, and, therefore, all lists of materials and statements made in the proposal shall become binding on the contractor and shall not be altered without prior approval of the Contracting Officer.

Defendant relies on the words "*shall not be altered without prior approval of the Contracting Officer*" and states that consent is required to substitute the Allis-Chalmers engine combination in Step 2.

To answer defendant we first refer to *Jack Stone Co.* v. *United States*, *supra*. We have heretofore discussed the case in detail to draw an analogy to this case. The present case is a stronger case in that both combinations of engines, Caterpillar and Allis-Chalmers, were on defendant's Qualified Products List.

We also answer defendant by the *contra proferentem* rule. We construe paragraph 5 above mentioned against the defendant. It was the defendant who drafted it. In *United Pacific Insurance Co.* v. *United States*, 204 Ct. Cl. 686, 695, 497 F. 2d 1402, 1407 (1974), we stated as follows:

> * * * The Government as drafter of the contract had a duty to shoulder the major task of seeing within a zone of reason that words of the contract correctly and concisely communicate the proper notions and intentions of the parties, and the Government must bear the burden of a failure to carry that responsibility. *L. Rosenman Corp.* v. *United States*, 182 Ct. Cl. 586, 390 F. 2d 711 (1968). The Government drafted this contract and as a result, any ambiguities that were created should be strictly construed against the Government. *Merritt* v. *United States*, 95 Ct. Cl. 421 (1942); *Wunderlich Contracting Co.* v. *United States*, 143 Ct. Cl. 876, 166 F. Supp. 741 (1958).

The following recent cases are in accord: *H & M Moving, Inc.* v. *United States*, 204 Ct. Cl. 696, 716, 499 F. 2d 660, 671 (1974); *Max Drill, Inc.* v. *United States*, 192 Ct. Cl. 608, 427 F. 2d 1233 (1970); *Sturm* v. *United States*, 190 Ct. Cl. 691, 421 F. 2d 723 (1970). Accordingly, our construction of paragraph 5 is that, with relation to the word "contract" used in the paragraph, we construe it to include plaintiff's option clause and plaintiff's clarification heretofore recited. And, therefore, since the word "contract" with the above interpretation allows substitution of other engine configurations during Step 2, the last clause of said paragraph 5, "shall not be altered without prior approval of the Contracting Officer," becomes superfluous.

We believe that our construction is the only fair construction. We have shown that the MEP unit was not ready for the implementation of the configuration management and control program. The directive of the Department of De-

fense of July 17, 1968, required implementation by the MEP unit within 90 days (by October 17, 1968); and with relation to "Procurement Aspects," it required that:

> * * * *Procurement planning and contract practices must be responsive to configuration management requirements.* [Emphasis supplied.]

The directive clearly placed a burden on the MEP unit to plan and adopt contract practices responsive to configuration management and controls. Furthermore, it was also clear from the directive that the position held by defendant's witness Joseph Sullivan, as project manager, was a position created by reason of the directive and his duties were as follows:

> 4. *Responsibility for Configuration Management.* DOD Components shall exercise their responsibility for configuration management by designating, for each CI [Configuration Item], an individual who is assigned the responsibility and delegated the authority for management of the item's configuration. For each CI for which system/project management is required in accordance with reference (d), the individual designated shall be the system/project manager. * * *

His absence during the most critical period, when the minute details should have been worked out, did not help the MEP unit at all. He did not even read and check the LRFTP before it was issued. Had there been clear guidelines and better responsive contract practices provided, many of the difficulties in the present case may have been avoided.

It was not the intent of the directive to prejudice contractors who in good faith followed the directive and offered configuration management and control proposals in their respective technical proposals. This is especially so where the unit was not fully prepared to carry out the directive. The directive provided that the objectives of configuration management were:

> A. To assist management in achieving, at the lowest sound cost, the required performance, operational efficiency, logistics support and readiness of configuration items.
>
> B. To allow the maximum degree of design and development latitude yet introduce at the appropriate time

the degree and depth of configuration control necessary for production and logistics support.

C. To attain maximum efficiency in the management of configuration changes with respect to their necessity, cost, timing and implementation.

D. To attain the optimum degree of uniformity in configuration management policy, procedures, data, forms and reports at all interfaces within the DOD and between DOD and industry.

The configuration management and control provisions in plaintiff's technical proposal were to carry out these basic, worthy Department of Defense purposes. Contract clauses are to be construed to effectuate the spirit and purpose of the clauses. *Petrofsky* v. *United States*, 203 Ct. Cl. 347, 356, 488 F. 2d 1394, 1399 (1973); *Global Van Lines, Inc.* v. *United States*, 177 Ct. Cl. 829, 836 (1966). Our construction is in support of and in accord with the directive and its purposes.[11] Plaintiff should be commended for its full cooperation with the MEP unit in effectuating the directive of the Department of Defense.

Upon the facts recited in the early part of this opinion, we find that defendant on July 29, 1970, unlawfully stopped and thereafter continued to stop plaintiff from substituting engines manufactured by Allis-Chalmers (Combination 4, Allis-Chalmers Model 11000—100 KW and Allis-Chalmers Model 25000—200 KW) for engines manufactured by Caterpillar (Combination 1, Cat. Model D33T—100 KW and Cat. Model D343TA—200 KW), even though plaintiff had the right to substitute during the Step 2 period Allis-Chalmers manufactured engines (Combination 4 aforementioned) under the contract. Defendant's action constituted a constructive change to the contract.

Therefore, under Count I (labeled "First Cause for Relief" in plaintiff's amended petition), we hold that plaintiff is entitled to recover and judgment under Count I is entered granting plaintiff's motion for summary judgment on the issue of liability. As for Count II (labeled "First Cause of

[11] It was intimated by defendant at the trial before the ASBCA that plaintiff violates certain priorities in construing the contract. We are concerned with a Department of Defense directive which goes to the heart of the present case. The directive is paramount as compared to the priorities defendant points to.

Action" in the amended petition), in view of our granting relief under Count I, we deny relief under Count II.[12]

Defendant's motion for summary judgment under Count I is denied. In view of our denial of relief to plaintiff under Count II, defendant's motion for summary judgment under Count II is allowed.

Pursuant to Rule 149 of this court, further action in this court will be suspended for six months from this date to allow the parties to return to the ASBCA for calculation of the amount to which plaintiff is entitled under Count I by reason of defendant's constructive change in accordance with this opinion. Pursuant to Rule 149(f) and upon conclusion of the proceedings of the ASBCA, the plaintiff will report the result to the court and the parties will take further action for the final disposition of the case in this court.

DAVIS, *Judge*, concurring. COWEN, *Chief Judge*, joins in the concurring opinion of Judge Davis and the opinion of Judge Kashiwa.

I do not disagree with the demonstration in the court's opinion that plaintiff retained the option to supply Allis-Chalmers engines, and therefore I join in that opinion. I would like, however, to expose an additional ground for reaching the same result.

Even if plaintiff was required by its contract to furnish Caterpillar engines, the record shows (and the Board of Contract Appeals found) that the contracting officer was entirely satisfied with the Allis-Chalmers engine except for the price reduction offered by plaintiff for the substitution of the latter engine. The plaintiff countered that it was willing to abide by the equitable adjustment to be determined under the Disputes clause. The Board ruled that "regardless of the prudence of such action" it was contractually permissible for the contracting officer to refuse to leave for later determination the amount of the reduction in the contract price. I do not

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[12] A party cannot maintain a separate breach of contract action which seeks no relief further or different from that which was available to it under the contract. *L. W. Foster Sportswear Co.* v. *United States*, 186 Ct. Cl. 499, 502, 405 F. 2d 1285, 1287 (1969); *Wm. A. Smith Contracting Co.* v. *United States*, 188 Ct. Cl. 1062, 1091–92, 412 F. 2d 1325, 1341 (1969).

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think, however, that, where, as here, a procuring agency is fully satisfied with the qualities, workmanship, durability, etc. of a substituted product, it can reject the substitution simply because the price reduction offered by the contractor is in its view too small. The mechanism of the Changes and Disputes clauses provides a means for resolving such a controversy solely over money. That mechanism should have been used when, as this record makes clear, price was the only matter displeasing to the Government.

In the circumstances of this case, I believe that this alternative position would lead to the same monetary result as that set forth in the court's opinion.

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532 F. 2d 1352

KORN INDUSTRIES, INC. v. THE UNITED STATES

[No. 268-74. Decided April 14, 1976]

ON DEFENDANT'S AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Taxes; income tax; accounting method; adjustment in items of inventory.—Plaintiff, a furniture manufacturer using an accrual method of accounting with its fiscal year ending November 30, seeks to recover an amount allegedly constituting overpayment of income tax for its 1969 fiscal year, plus statutory interest. In checking inventories for fiscal 1969 plaintiff's auditors discovered that due to an accountant's error 3 elements of the 14 materials costs of each piece of furniture in the finished goods inventory had not been included in the calculation of said inventory for fiscal 1965, 1966, 1967 and 1968. These improper omissions caused a correspondingly improper addition to the cost of goods sold and thus an understatement of taxable income. Plaintiff's Federal income tax return for fiscal 1969 reported inventories considerably increased over the closing inventories shown in its 1968 return. The Internal Revenue Service after audit assessed a deficiency on the ground that plaintiff had changed its method of accounting in fiscal 1969 necessitating an adjustment pursuant to Sec. 481 of the Internal Revenue Code of 1954. Plaintiff admitted that its taxable income for 1967 and 1968 should be increased by a stated sum which it paid, and, after notice of deficiency, plaintiff paid the balance allegedly due for fiscal 1969. Following disallowance of its claim for refund, plaintiff instituted the present suit, contending that it did not change its method of accounting and that Sec. 481 is inapplicable. It is *held*

Opinion of the Court

that, under the present circumstances, there was no change in plaintiff's accrual method of accounting and that the adjustment was merely to correct an inventory error. It is conceded that, but for Sec. 481, plaintiff would be entitled to invoke limitations as it would any other good faith error discovered in returns for closed years. Plaintiff's motion for summary judgment is granted, defendant's cross-motion is denied, and judgment is entered for plaintiff for $27,618.80, plus statutory interest computed from June 11, 1973.

Taxes; assessment of taxes; method of accounting; adjustments; legislative intent.

[1] The principal intent of Congress in enacting Sec. 481 of the Internal Revenue Code of 1954 was to ensure that after 1954 no item would escape taxation or be over-taxed or under-taxed when a taxpayer changed its method of accounting or reporting income.

Internal Revenue ⟸ 1337

Taxes; income tax; accounting periods and method of accounting; adjustments; change in accounting method; what constitutes.

[2] Where taxpayer in 1969 adjusted its finished goods inventory to include 3 elements of the 14 materials costs making up each finished item because they were inadvertently omitted from said inventory calculation in prior tax years due to an accountant's error, since plaintiff in valuing inventory did not change its basis of valuation, did not neglect to include overhead, did not deduct a percentage of the cost of inventory items, did not omit the cost of the 3 items from year-end inventory, raw materials inventory or work-in-progress or supply inventory, and at all times computed its income under the accrual method of accounting, it cannot be said that there has been a change in method of accounting as contemplated by Sec. 481 of the Internal Revenue Code of 1954, but only correction of an inventory error.

Internal Revenue ⟸ 1337

Wallace C. Murchison, attorney of record for plaintiff. *Murchison, Fox & Newton*, of counsel.

Charles E. Auslander, Jr., with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser* and *Donald H. Olson*, of counsel.

Before NICHOLS, KASHIWA and KUNZIG, *Judges*.

NICHOLS, *Judge*, delivered the opinion of the court:

Plaintiff, Korn Industries, Inc., brings this action to recover Federal income taxes of $27,618.80 for the taxable year ended November 30, 1969, plus statutory interest. We

have jurisdiction pursuant to 28 U.S.C. § 1491. The question before the court is whether the taxpayer's inclusion of three additional items of cost in computing its finished goods inventory for taxable year 1969, not previously included, constituted a change in the plaintiff's method of accounting within the meaning of Sec. 481 of the Internal Revenue Code of 1954. We hold for plaintiff.

The material facts are not in dispute. Taxpayer, a South Carolina corporation in the business of manufacturing furniture, keeps its books and records using the accrual method of accounting, with its fiscal year ending November 30. For the fiscal year ended November 30, 1969, and for many years prior thereto, in determining its taxable income, taxpayer had arrived at and used inventory valuations as follows: Separate inventories of raw materials, work-in-process, supplies and finished goods were taken as of each November 30, based on physical count and calculation of actual cost. The actual cost of each piece of furniture in the finished goods inventory was computed by using the standard cost for that piece, which standard cost was assigned at the beginning of the year, and then adding or subtracting any variances between the standard cost and the actual cost, as of the end of the year. The standard cost of each piece of furniture was the aggregate of the cost elements of materials, labor and overhead in that piece. There were 14 kinds of materials in the finished furniture, as follows: (1) lumber, (2) squares, (3) wood bedrails, (4) metal bedrails, (5) mirrors, (6) mirror frames, (7) plywood, (8) plastic and plastic tops, (9) finishing materials (paints, varnishes, etc.), (10) glue, (11) hardware, (12) nails and screws, (13) cartons, and (14) packing supplies.

In checking inventories for fiscal 1969 plaintiff's auditors discovered that three elements of the 14 materials costs had by an accountant's error not been included in the calculation of the finished goods inventory for fiscal 1965, 1966, 1967 and 1968. These elements were plywood, plastics and plastic tops, and finishing materials, except that plastics and plastic tops had not been cost elements in 1965. These 3 elements of cost were not omitted from the raw materials inventory, the work-in-process inventory or the supplies inventory.

The cost elements omitted from the inventories for the years 1965 through 1968 were as follows:

Cost Elements	Fiscal year ended November 30: 1965	1966	1967	1968
Plastics	-0-	$5,252	$14,361	$8,503
Plywood	$17,676	14,771	35,054	38,521
Finishing materials	19,602	21,410	37,089	31,354
Total omissions	$37,278	$41,433	$86,504	$78,378
Total Inventory Per Books		$1,314,355	$1,513,519	$1,530,355
Adjusted Total Inventory		$1,355,788	$1,600,023	$1,608,733
Percent of Cost of Items Omitted to Total		3.06%	5.41%	4.87%

These improper omissions from the finished goods inventory caused a correspondingly improper addition to the cost of goods sold and thus an understatement of taxable income.

Plaintiff's income tax return for fiscal 1969 reported beginning inventories of $1,608,733, an increase of $78,378.00 over the closing inventories shown on its 1968 return. The Internal Revenue Service (IRS) audited plaintiff's return for the fiscal year ended November 30, 1969, and by a 30-day letter determined that the omission of the 3 items of materials costs in prior tax years and the adjustment in plaintiff's beginning inventory for 1969 was a "change in method accounting" during 1969 necessitating an adjustment pursuant to Sec. 481 of the Internal Revenue Code. The IRS increased plaintiff's taxable income for 1969 by $78,378, and computed a deficiency, as per Sec. 481(b)(1) of $40,023.34. Plaintiff filed a protest to the 30-day letter denying that there was a "change in method of accounting" in 1969 but admitting that its taxable income for 1967 and 1968 should be increased by $36,945. For convenience the additional taxes admitted due were calculated as a deficiency for 1969 and on September 27, 1972, plaintiff paid the IRS $19,462.64, representing $17,733.60 tax and $1,729.40 interest. Plaintiff refused to pay the balance of the $40,023.34 proposed deficiency. The real dispute is whether plaintiff has the benefit of the statute of limitations as to 1966 and 1965.

Thereafter on January 12, 1973, the IRS, by statutory notice of deficiency, determined that plaintiff owed $40,023.34 on the same basis as proposed in the 30-day letter. Plaintiff paid the balance due of $27,618 and then filed a claim for refund. Plaintiff contends that it did not change its method

of accounting and that Sec. 481 is inapplicable. Plaintiff's claim was disallowed and it timely filed suit in this court.

Section 481(a) of the Internal Revenue Code of 1954 entitled "Adjustments required by changes in methods of accounting," states in pertinent part:

> (a) *General rule.*—In computing the taxpayer's taxable income for any taxable year * * *
> (1) if such computation is under a method of accounting different from the method under which the taxpayer's taxable income for the preceeding taxable year was computed, then
> (2) there shall be taken into account those adjustments which are determined to be necessary solely by reason of the change in order to prevent amounts from being duplicated or omitted, except there shall not be taken into account any adjustment in respect of any taxable year to which this section does not apply unless the adjustment is attributable to a change in the method of accounting initiated by the taxpayer.

Section 481 was added to the Code in 1954 so that "If there is a change in the method of accounting employed in computing taxable income from the method employed for the preceeding taxable year, adjustments must be made in order that every item of gross income or deduction is taken into account and that none are omitted. At the same time no item is to affect the computation of taxable income more than once. It is only those omissions or doubling ups which are due to the changes in method which must be adjusted." H. Rep. No. 1337, 83d Cong., 2d Sess. (1954), 3 U.S. Code, Cong. & Adm. News (1954), 4017, 4303; S. Rep No. 1622, 83d Cong., 2d Sess. (1954), 3 U.S. Code Cong. & Adm. News (1954), 4621, 4947. Courts have recognized that the principal intent of Congress in enacting Sec. 481 was to ensure that after 1954 no item would escape taxation or be over-taxed or under-taxed when a taxpayer changed its method of accounting or reporting income. *Grogan* v. *United States*, 475 F. 2d 15 (5th Cir. 1973); *Commissioner* v. *Welch*, 345 F. 2d 939 (5th Cir. 1965); *Graff Chevrolet Co.* v. *Campbell*, 343 F. 2d 568 (5th Cir. 1965). Defendant, in its brief emphasized the sentence from the House Report quoted above beginning "At

the same time." However, the real issue in this case is whether there has been a "change in method of accounting." Unless this condition has been met, Sec. 481 does not come into play.

As to this, the parties have cited numerous cases. We have considered them but none are close on the facts. The adjustments in issue present a novel problem. Defendant relies on the recent case of *Witte* v. *Commissioner*, 513 F. 2d 391 (D.C. Cir. 1975) to show that Sec. 481 covers a change from an improper method to a proper one. We may concede the truth of this, but it does not tell us, were plaintiff's egregious errors a "method" at all?

Section 481 does not define the phrase "change in method of accounting." Relevant Code Provisions and Regulations recognize that this phrase has a double meaning. The Senate Report refers to a change in the method of accounting or to a change in the manner in which taxpayers compute significant items such as inventories. At 4696. The applicable Regulations specify that a change in method of accounting, as contemplated by Sec. 481, includes "a change in the overall method of accounting for gross income or deductions, or a change in the treatment of a material item." Treas. Reg. 1.481–1(a). Similar language appears in Treas. Reg. 1.446–1 (e), which is incorporated in Treas. Reg. 1.481. Section 446 of the Code provides further assistance in determining what constitutes a "change in method of accounting." Section 446 (a) provides that taxable income shall be computed under the method of accounting on the basis of which a taxpayer regularly computes his income. Overall methods of accounting are the cash receipts and disbursements method, the accrual method, other permissible methods such as the crop method, installment method, long-term contract method and combinations of the foregoing. Treas. Reg. 1.446–1(c). Moreover, Treas. Reg. 1.446–1(e)(2)(ii) provides rules relating to changes in methods of accounting. A change in the overall method of accounting is a change from accrual to a cash basis system and vice versa, or cash or accrual to long term contracts. Taxpayer here computed its income under the accrual method of accounting. It did not change to any different method. Plaintiff's actions in adjusting its inventory is clearly not a change in the overall method of accounting. To

come within the statute then it must be shown that plaintiff's inclusion of the three items constituted a change in the treatment of a material item.

The Treasury Regulations exemplify "material item" in 1.481–4(g)(3) as research and experimental expenditures, soil and water conservation expenditures, last-in, first-out inventories and exploration expenditures. Plaintiff points out that these "items" constitute entire classes of expenditures rather than individual items of costs such as plaintiff omitted. While the Regulation is not directly applicable to this case, it does provide some guidance in delineating a material item. Of further help is Treasury Regulation 1.446–1(e)(2)(ii)(a) (1973) which defines material item as "any item which involves the proper time for inclusion of the item in income or the taking of a deduction." Defendant urges that plaintiff's treatment of the 3 items in question was changed in 1969 from currently expensing those items to deferring the deduction by including them as inventory cost, constituting a change in the treatment of an item affecting the proper time for taking the deduction. Defendant quotes Treas. Reg. 1.446–1(e)(2)(ii)(c) which provides that a change in the overall plan or system of identifying or valuing items in inventory is a change in the method of accounting and that change in the treatment of any material item used in the overall plan for identification or valuing inventory is a change in the method of accounting. However such an interpretation overlooks the realities of the case. At no time did plaintiff change its standard cost method of valuing inventories. Plaintiff did not change its basis of valuation from cost to the lower of cost or market price. It did not neglect to include overhead in valuing inventories. It did not deduct a percentage of the cost of inventory items in valuing inventory. It did not omit the cost of the 3 items of materials from the year end inventory, raw materials inventory or work-in-progress or supply inventory. Plaintiff's action falls more readily into the category described in Treas. Reg. 1.446–1(e)(ii)(b) that is "correction of mathematical or posting errors." There is no allegation of fraud or bad faith on plaintiff's part and therefore we must assume that plaintiff's omission of the 3 items was inadvertent. It cannot be

said that the omission of three items, while including the rest of the materials costs, was a proper method of accounting. It was most assuredly an error analagous to a mathematical or posting error. There has not been any change in method of accounting as contemplated by Sec. 481 but only a correction by plaintiff of an inventory error. Since the first condition of Sec. 481 has not been met, plaintiff's taxable income for 1969 should not be further adjusted. It is conceded that, but for Sec. 481, plaintiff would be entitled to invoke limitations as it would any other good faith error discovered in returns for closed years.

Accordingly, plaintiff's motion for summary judgment is granted, defendant's motion for summary judgment is denied, and judgment is entered for plaintiff in the amount of $27,618.80, with interest, as provided by law, from June 11, 1973.

HAROLD S. RIFKIN v. THE UNITED STATES

[No. 437-70. Decided April 14, 1976]

ON THE PROOFS

Civilian pay; oversea employee; dismissal; alteration of travel orders; penalty v. offense; duty status; *ex parte* communications.—Plaintiff, a former civilian employee of the United States Army Procurement Center, Frankfurt, Germany, with an aggregate of more than 23 years of satisfactory Federal service, was removed from his position as comptroller, GS-12, Step 3, on the charge that he defrauded the United States Government by changing his grade and salary on a copy of his travel orders in order to obtain first-class rather than cabin class shipboard accommodations for his round-trip biennial home leave furnished at Government expense. Plaintiff was removed in April 1965; he appealed his removal to the major commander, the Commander in Chief, United States Army, Europe, and was given an evidentiary adversary-type hearing before a grievance examiner who concluded that the penalty was too severe for the offense and recommended lesser punishment; the recommendation was referred to an Employee Appeals Review Board which found that the charge was supported, that the appeal should be denied and that plaintiff should be removed for the good of the service; the Commander in Chief, Europe, on August 30, 1965 advised plaintiff that he would not set aside or modify the administrative decision to remove him and informed plaintiff of his right to

Syllabus

seek review either by the Secretary of the Army or the Civil Service Commission, but not both; plaintiff appealed to the Secretary of Army who sustained the removal after the Employment Policy and Grievance Review Board investigated an additional claim of discriminatory treatment of civilian personnel vis-à-vis military personnel; thereafter the American Federation of Government Employees raised the issue of possible use of *ex parte* communications in plaintiff's case—copies of the communications were subsequently furnished plaintiff, his counsel submitted comments thereon, in a supplemental report the Employment Policy and Grievance Review Board found no facts warranting modification of the department's decision, and on November 25, 1966 the Deputy Under Secretary of the Army so advised plaintiff; on June 2, 1966 plaintiff filed an appeal to the Civil Service Commission which was disallowed on grounds that plaintiff had exhausted his appellate rights by filing an appeal with the Secretary of the Army; this action was affirmed by the Commission Board of Appeals and Review. Plaintiff seeks back pay and reinstatement, contending also that regardless of the correctness of his discharge he was wrongfully deprived of his duty status and of his pay for the period from April 13, 1965, the initial date of the determination to remove him, to August 30, 1965. For the reasons set forth, it is *held* (1) that plaintiff should be compensated for the period he was wrongfully deprived of duty status consonant with the Civilian Personnel Regulations E2.5, Special Provisions for Oversea Employees, para. 5–8.*c*; (2) that the record does not show an abuse of discretion by the Department of the Army in imposing the penalty of removal or that the penalty was unduly harsh; and (3) that with respect to two of the *ex parte* communications, they were not prejudicial to plaintiff and consideration thereof appears to be within the regulations; that with respect to the third communication, any error at the European level in receiving and considering the same was cured and rendered harmless at the level of the Secretary of the Army. The amount of plaintiff's recovery for the period from April 13 to August 30, 1965 will be determined in further proceedings under Rule 131(c). Plaintiff is not entitled to recover on the rest of his claim and that portion of the petition is dismissed.

Civilian pay; oversea employees; grievance and appeal procedures; retention on duty status.

[1] In the context of the Grievance and Appeal Procedure, Civilian Personnel Regulations E2, Special Provisions for Oversea Employees, Sec. 5–8, the provision for allowing employees "eligible for return transportation" who are appealing removal actions to remain in duty status pending disposition of their appeals by the major command is not limited to the time after they have completed their periods of service without having taken home leave.

United States ⇦ 36

Syllabus

Civilian pay; oversea employees; removal appeal; duty status; entitlement to compensation during period of appeal.

[2] Where an oversea employee who had completed his biennial home leave with round-trip transportation at Government expense pursuant to Civilian Personnel Regulations and whose appeal for removal for cause was pending, involuntarily waived his duty status and his suspension was not processed as provided in the Special Provisions for Oversea Employees, Sec. 5–8, he is entitled to compensation for the period from the date of his removal to resolution of the appeal even though he did not complete a new tour of duty.

United States ⇐ 39(8)

Civilian pay; administrative discretion; penalties.

[3] The measure of penalty imposed on a civilian employee for misconduct is within the discretion of the agency and the decision to remove him will not be disturbed by the court absent procedural error or an abuse of discretion. The test for abuse of discretion requires a showing by the employee that the penalty is so harsh that there is an inherent disproportion between offense and punishment. Where plaintiff, a high-level employee in a position of great trust, knowingly, willfully and deliberately directed his secretary to alter the grade and salary designation on his travel authorization and had the changed document reproduced in several copies and used such false copies to obtain first-class shipboard accommodations for his round-trip biennial home leave furnished at Government expense, and where the ultimate decision to remove plaintiff was made by the office of the Secretary of the Army after a full review of all pertinent facts, the penalty of removal was not an abuse of administrative discretion nor so unduly harsh as to be disproportionate to the offense. The responsibility for discipline lies with management and in this instance, though the sanction may have been severe, management's discretion was not abused.

United States ⇐ 36

Civilian pay; dismissal; evidence; *ex parte* evidence; use of in administrative appellate proceedings.

[4] A memorandum from an Employee Appeals Review Board set up pursuant to regulations giving its recommendations for review by the Commander in Chief, Europe, respecting plaintiff's appeal of his dismissal, cannot be considered inherently unfair or prejudicial to plaintiff where it was not unreasonable for the Commander to seek assistance from his staff, the members of which had not been involved in the dismissal proceedings, and the review was not an adversary hearing.

United States ⇐ 36

Civilian pay; dismissal; evidence; *ex parte* evidence; use of in administrative appellate proceedings.

[5] It is not improper for the commander in compliance with the request of the Secretary of the Army to furnish comments on

Per Curiam

plaintiff's appeal brief filed in connection with his dismissal, since the regulations providing for appeal specifically contemplate such comments and are silent concerning making such comments available to an appellant.

United States ⇐ 36

Civilian pay; dismissal; evidence; *ex parte* evidence; use of in administrative appellate proceedings.

[6] Whatever prejudice to plaintiff may have resulted from an *ex parte* letter from the superior of one who conducted the investigation of plaintiff, urging the Commander in Chief, Europe, before whom plaintiff's appeal contesting his removal was then pending, to sustain the removal because appellant was guilty of fraud against the United States and not to follow the grievance examiner's recommendation of punishment less severe than discharge, any error at the European level in receiving and considering the letter was cured and rendered harmless of the level of the Secretary of the Army to whom appellant elected to appeal, when thereafter the letter was made available to plaintiff, his counsel had opportunity to comment thereon, the Employment Policy and Grievance Review Board reconvened to reconsider the matter, and the Office of the Secretary then reconfirmed the decision upholding removal.

United States ⇐ 36

Civilian pay; laches; generally.

[7] This court will not apply the defense of laches where plaintiff limited his back pay claim to an early period for which the court has determined he would have been entitled to recover had he brought suit more promptly, and where the issue was purely one of law, there is no problem of lost records, unavailable witnesses or faded memories, nor would the Government have been saved a double salary for the period if plaintiff had sued earlier.

United States ⇐ 39(12)

Harold S. Rifkin, pro se.

LeRoy Southmayd, Jr., with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before DAVIS, SKELTON, and BENNETT, *Judges.*

PER CURIAM: Plaintiff, while employed as a civilian at the United States Army Procurement Center, Frankfurt, Germany, was charged with the offense of "altering and using an official document to defraud the United States" and was subsequently removed from his position as comptroller, GS–12, Step 3, in 1965. Plaintiff, who appears *pro se*, sues for

back pay and reinstatement from April 1965. Defendant urges that there is no merit to plaintiff's claim, and that suit not having been filed until December 8, 1970, in any event the claim is barred by the doctrine of laches.

Defendant's motion for summary judgment was denied by order dated April 27, 1973. The case was remanded to the trial judge for appropriate proceedings toward resolution of disputed factual issues, "in particular those relating to any possible *ex parte* evidence, any factors pertaining to plaintiff which might affect the application of the doctrine of laches to the case, and others."

After a trial, Trial Judge Miller concluded that (a) under the pertinent military regulations plaintiff had been wrongfully deprived of his pay from April 13, 1965 to August 30, 1965 (*i.e.* from the original date of his removal to the completion of his appeal to the major command in Europe); (b) the penalty of removal was, in all the circumstances, an abuse of discretion and too harsh; (c) the appropriate penalty would be no more than suspension without pay for a period of approximately two years and six months (from June 8, 1968 to December 8, 1970); (d) the bar of laches should not preclude the entire suit but only foreclose recovery for the same period (June 8, 1968 to December 8, 1970); (e) plaintiff is entitled to be restored to his former position (or to an equivalent position in Grade GS–12); and (f) plaintiff is entitled to back pay from April 13, 1965 (his initial removal date) to the date of his restoration to duty, with the exception of the two and one-half year period from June 8, 1968 to December 8, 1970.

We agree with the first of these holdings but disagree with the second and the third. Our determination, contrary to that of the trial judge, is that removal was not an abuse of discretion. This conclusion disposes of the demand for restoration and the bulk of the claim for back pay, and makes it unnecessary for us to consider the defense of laches as it applies to that major portion of the back-pay claim which we deny on the merits.

In Parts I and II of this opinion we adopt the trial judge's statement of the facts and his discussion of the minor back-pay claim for the period from April 13, 1965, to August 30,

1965. In Part III we set forth our own evaluation of the severity of the penalty, in the light of all the circumstances, and of the argument that the Army abused its discretion in separating plaintiff. Next, in Part IV, we adopt and supplement the trial judge's discussion of the alleged procedural errors with respect to *ex parte* presentations. Part V concludes with our own short analysis of why laches does not bar the lesser pay-claim for April–August 1965.[1]

I

It was the responsibility of the Procurement Center's comptroller's office, which plaintiff headed, to maintain its financial records. All requests for payment of obligations, totaling some $400 million annually, had to be certified by the comptroller's office. Plaintiff supervised some 40 clerks whose function it was to match requests with supporting documents and balances of funds on account, certify that the obligations could be paid, and then record the expenditures. The comptroller's office itself kept no cash and could only certify for payment requests accompanied by the appropriate documents, *e.g.*, contract, travel order, delivery receipt, none of which were within the purview of the comptroller's office.

Plaintiff, who had an aggregate of more than 23 years of satisfactory Federal service, began his service in the Procurement Center in 1958 as an accountant, GS–10. Throughout his employment there to 1965 plaintiff received consistently high performance ratings, and was rapidly promoted. In 1963 he became comptroller, GS–12. He earned a reputation for outstanding technical competence and proficient, innovative work. Twice, in 1960 and 1962, he received sustained superior performance awards. On December 28, 1964, just a few days prior to the incident causing his removal, plaintiff for the second straight year was recommended by his superiors for promotion to a GS–13 grade.

The facts surrounding the incident leading to the removal action are mostly not in dispute. Civilian employees of the Department of the Army hired in the United States and

[1] This opinion embodies the necessary findings of fact.

stationed in Germany were entitled and encouraged to take biennial home leave at Government expense. The travel authorization for plaintiff and his wife for purposes of such leave was dated December 18, 1964. It authorized their travel outside the United States by Government air, rail and water transportation, or by his own vehicle, and within the United States by first-class air, air tourist (if available) and rail transportation or by his own vehicle. It also listed their port of embarkation to be Bremerhaven, their date to report there, January 5, 1965, and the name of the vessel on which he was booked, *SS United States*. After a month's vacation in Beverly Hills, California, on February 8, 1965, plaintiff was scheduled to proceed to Rock Island, Illinois, to attend a 2-week Army seminar on top management and on February 24, 1965, to be available for return travel. The travel authority made no arrangements for return booking.

Travel accommodations for Department of Defense personnel were handled by the Military Sea Transportation Service (MSTS). The names, status, and family compositions of those scheduled to travel were supplied by the sponsoring agency and they were then assigned accommodations by the MSTS on the basis of rank or GS level. There was no fixed cutoff between those entitled to first-class and those entitled to cabin-class accommodations, either in any regulation or in actual practice. It depended on the blocks of space procured by MSTS for a particular voyage and the actual mix of the authorized travelers. On one sailing all GS–13's or equivalent might be in cabin class, on another the GS–12's might be in first class. An effort was made, however, to avoid aggravated invidious treatment by placing all those in the same grade in similar accommodations. On the January 5, 1965 voyage of *SS United States* GS–13's were placed in first class, GS–12's and below in cabin class. Plaintiff, who had been listed with the MSTS as a GS–12, was therefore assigned cabin accommodations.

After the ship departed Bremerhaven, plaintiff presented to the assistant purser of the ship additional copies of his travel orders, which he had previously altered so as to indicate falsely that his grade was a GS–13, and sought reassignment to first-class accommodations. At Southampton the

purser called the "mistake" to the attention of the MSTS representative and the latter obtained first-class accommodations for plaintiff and his wife at an additional cost to the Government of $351.

Shortly thereafter, Col. John T. McKee, Commanding Officer of the Army Procurement Center, received a complaint from the Army Transportation Command that the Procurement Center had furnished erroneous travel orders designating plaintiff at a level inferior to his actual rank. At Colonel McKee's direction an investigation was conducted by the Criminal Investigation Detachment (CID). The CID eventually located and interviewed plaintiff at his hotel in California, and he admitted the alteration and misuse of the altered travel order. Colonel McKee ordered plaintiff to return to Frankfurt at the end of his leave without attending the seminar, and plaintiff departed from New York on February 8, 1965.

Colonel McKee retired from the Army on March 1, 1965. Based on the information received by that time, Colonel McKee had decided to proceed with action to remove plaintiff from the Service. Prior to his departure he discussed this fully with his successor, Col. George E. Larsen. On March 2, 1965, Colonel Larsen sent plaintiff an "Advance Notice of Proposed Removal," effective April 5, 1965, charging him—

> with altering and using an official document to defraud the United States Government * * * [by] chang[ing] the grade and salary from GS–12, $10,960 to GS–13, $12,075 on a copy of [his] travel orders * * * [by presenting it to] an assistant purser on the S.S. United States * * * for fraudulent purposes * * * to change [his] accommodations [to those] based on the grade GS–13 indicated thereon. * * *

As authorized by the notice, at plaintiff's request, an informal meeting was held with Colonel Larsen on March 10, 1965, for presentation of plaintiff's side of the case. Also present were plaintiff's attorney and Maj. Eugene Murphy, Colonel Larsen's Procurement Judge Advocate. Plaintiff admitted the alteration but claimed in mitigation his actions had been motivated by his depression over the fact that his position was deserving of a higher grade (to which he had been twice recommended) and by the fact that many of his

friends mistakenly thought he held a higher grade. Thus he decided to maintain that posture in their eyes. He claimed he had no intention to defraud the United States, but had presented the altered orders to the purser in a moment of foolishness and "poor judgment," and under the influence of medically prescribed tranquilizing drugs. Plaintiff stated that he was "very, very sorry" and that he wanted to reimburse the Government for the cost involved, which he subsequently did. Plaintiff also detailed his long, distinguished, and theretofore unblemished, record in the military and civil service and pleaded that he could continue to render competent and trustworthy service. The formal written reply to the proposed removal submitted by plaintiff on April 2, 1965, embodied these same represenations.

On April 7, 1965, Colonel Larsen advised plaintiff of his removal on the ground that there was substantial evidence to support the charges of—

> altering and using an official document to defraud the US Government * * *. In view of your military service in the Finance Corps, including approximately seven years as a Lieutenant, your approximately two years as a Supervisory Accountant with the US Army Audit Agency, and over six years with the US Army Procurement Center Frankfurt as an Accounting Officer, Supervisory Accountant, and Comptroller, you were especially well qualified to be aware of the gravity and implications of your actions. * * *

As entitled by Department of the Army Civilian Personnel Regulations, plaintiff appealed his removal to the major commander, the Commander in Chief, United States Army, Europe (CINC USAREUR). Incident to such an appeal plaintiff was entitled to an evidentiary adversary type hearing before a grievance examiner, who was to make findings and conclusions for submission to the Commander in Chief. This was held on May 24, 1965.

At the administrative hearing Colonel Larsen justified his ouster of the plaintiff on the ground that Mr. Rifkin's position required him to sign documents authorizing the outlay of huge amounts of Federal funds, and that such authority required a man whose trustworthiness and absolute honesty in all matters is beyond all doubt in the minds of both his

superiors and subordinates, whereas plaintiff's conduct had permanently impaired that trust. The grievance examiner found that there was no question as to the objective facts of plaintiff's conduct, but that the maximum penalty, which under the regulations could have ranged from a 5-day suspension to removal from the Federal Service, was too severe for the offense.

She was of the view that inadequate consideration had been given to plaintiff's prior record of more than 20 years of exemplary Federal, military and civilian, service and that his one fall from grace was not in the course of his regular duties and did not show that he had or would betray a trust involved in such duties. With respect to the commanding officer's finding that Rifkin had intended to defraud the Government, she found more persuasive the statements of two of his co-workers that his misdeed was the product of personality traits which placed undue emphasis upon recognition of his prestige and importance, rather than any intent to defraud. Moreover, she found that "there is no regulation which states that Mr. Rifkin was *not*, even as a GS 12, precluded from first class accomodations [sic]", and that there was a question whether the Government had suffered any loss and whether the loss would not have been considered an acceptable condition on another sailing date.

The grievance examiner concluded that the penalty of removal was too severe under the circumstances of this case because (1) while plaintiff did use an official document to defraud the Government, there was no evidence that at the time of alteration he intended to so defraud; (2) he had a long career of faithful and outstanding service; and (3) he could still render trustworthy and effective service in another position. Accordingly the examiner recommended that plaintiff be transferred to another organization at a different location, suspended with loss of pay for up to 6 months, reduced to a lower grade and position in which he would have no responsibility for disbursing funds and/or changed to a nonsupervisory position.

As allowed in the Department of the Army Civilian Personnel Regulations, the Commander in Chief, Europe, referred the recommendations of the grievance examiner to an

Employee Appeals Review Board, at his headquarters, consisting in this instance of two army officers and one civilian employee. In July 1965, the board found that "the charge of altering and using an official document to defraud the United States Government is supported," that no relief should be granted due to the seriousness of the act and the comparative possible sentences if found guilty in a civilian or military court, and that accordingly Mr. Rifkin's appeal should be denied and his removal from the Federal Service be finalized for the good of the Federal Service.

On August 30, 1965, the Commander in Chief, Europe notified plaintiff that the appeal record "clearly supports the charge that you did alter and use an official document to defraud the United States Government" and that his removal would promote the efficiency of the Federal Service. Therefore, he would not set aside or modify Colonel Larsen's decision. He also advised plaintiff of his right to seek review by either the Secretary of the Army or the Civil Service Commission, but not by both. (Civilian Personnel Regulation S1.2–6*a*.(2)(*a*)(i) (Change 6, Feb 6, 1964).)

Plaintiff elected to appeal to the Secretary of the Army. In addition to challenging the penalty of removal as grossly excessive and not warranted, plaintiff raised the issue of discriminatory treatment of civilian personnel vis-à-vis military personnel by comparing his situation to that of a military officer with the Procurement Agency who had received substantially lighter punishment for an allegedly similar offense. After consideration of further information about this incident supplied by Headquarters, United States Army, Europe (USAREUR), at the Secretary's request, the Employment Policy and Grievance Review Board stated that "the charge of altering and using an official document to defraud the United States Government was supported by substantial evidence and warrants the action taken." The board had also directed an inquiry to Headquarters, USAREUR, regarding the severity of the penalty. The board noted its agreement with Headquarters, USA REUR's response to the effect that a person who had plaintiff's responsibilities for certification and financial management of procurement funds must exemplify the

highest standards of personal integrity and " 'Mr. Rifkin's deliberate action to defraud the United States necessitated his removal' ". On April 27, 1966, the Secretary of the Army sustained the removal as "appropriate in light of the nature of your offenses and your position of trust" and not an abuse of administrative discretion.

On June 3, 1966, the president of the American Federation of Government Employees wrote to the director of Civilian Personnel of the Army concerning the possible use of *ex parte* evidence in plaintiff's case. On July 28, 1966, the department supplied plaintiff copies of three documents so used: the letter dated July 2, 1965, from the Commanding General, Communications Zone Europe, to Commander in Chief, United States Army, Europe; the memorandum to the Deputy Chief of Staff at CINC USAREUR from the Appeals Review Board, dated July 27, 1965, setting forth its recommendations; and the comments on plaintiff's appellate brief that were furnished the Secretary of the Army by the Commander in Chief, United States Army, Europe, on March 2, 1966. Plaintiff's attorney was advised that he could submit any comments on the documents, and, under date of August 22, 1966, he did so. His comments were forwarded to the Office of the Under Secretary, Department of the Army, for consideration. Such submission together with the documents were considered by the Army, and in a supplemental report the Employment Policy and Grievance Review Board found no facts warranting modification of its original decision. On November 25, 1966, the Deputy Under Secretary of the Army advised plaintiff that it had been determined that there was no reason for modifying the department's decision of April 27, 1966.

On June 2, 1966, plaintiff appealed to the Civil Service Commission. On June 29, 1966, the Appeals Examining Office disallowed the appeal on grounds that plaintiff had exhausted his appellate rights by filing an appeal with the Secretary of the Army. Plaintiff's appeal of this decision to the Commission's Board of Appeals and Review was also denied on September 8, 1966. Meanwhile during 1966, plaintiff's wife wrote to the President of the United States complaining that her husband had been victim of religious discrimination. The matter was referred to the Equal Employment Opportunity

Officer of the Army who determined that the appeal had not been filed within the statutory period and therefore could not be considered. This decision was then appealed by plaintiff to the Civil Service Commission which sustained the Army's decision, most recently on April 13, 1967. Plaintiff's further efforts in 1969 to have the Army change Standard Form 50 issued him at the time of his removal, which stated "Employee altered and used an official document to defraud the United States Government," to omit any reference to the word fraud, were also fruitless. Suit was filed in this court on December 8, 1970.

Following his removal, plaintiff continued to reside in Germany. Eventually, in 1970, he obtained a job in the United States Army Commissary as a sales clerk, GS–3, Step 1, at an annual salary of $5,212. By August 1974 he had been promoted to supervisory supply clerk, GS–5, Step 10, earning $10,467.

II

Plaintiff claims that regardless of the correctness of his discharge he was wrongfully deprived of his pay for the period from April 13, 1965 (the initial date of the determination to remove him) to August 30, 1965 (when the major command confirmed his removal). The essence of his claim is that by regulation an oversea employee of the Army, recruited in the United States, is entitled to remain in duty status until the completion of his appeal to the major command.

The Civilian Personnel Regulations provide in pertinent part (CPR E2.5 (June 1962)):

SPECIAL PROVISIONS FOR OVERSEA EMPLOYEES

> 5–8. In processing an action under CPR S1 discharging for cause a United States citizen employee serving overseas who is eligible for return transportation at Government expense, or, who is ineligible for such transportation but who cannot remain in the oversea area after separation because of immigration requirements and/or agreements requiring repatriation to the country of residence, the special provisions set forth below will be applicable. These provisions do *not* apply to separa-

tion of an individual serving a probationary or trial period.

* * * * *

c. If the employee files an appeal and requests authority to remain in the command, the installation will extend the notice period and inform the employee that he will be retained at the installation in a duty status pending the hearing and final disposition of the appeal at the major command level. Should the reasons for the removal action preclude retaining him on duty, he will be retained at the installation but suspended without pay. The suspension must be processed under CPR S1 as a separate personnel action. The employee may also be permitted to remain at the installation in annual leave or leave without pay status *provided the submission of a written request for such leave is a completely voluntary action on the part of the employee.* Enforced annual leave will not be directed by the installation for the purpose of removing the employee from a duty status. [Emphasis in original.]

It is clear from the record that plaintiff's waiver of duty status was not "a completely voluntary action" within the meaning of the regulation and plaintiff did not waive duty status pending resolution of his appeal. Prior to the April 9, 1965 meeting with plaintiff, Colonel Larsen had been instructed by his judge advocate, Major Murphy, and the civilian personnel officer, Mr. Rowe, that plaintiff was likely to request to remain in duty status pending his appeal, but that plaintiff did not qualify under the regulation. Their rationale was that plaintiff, having just used his entitlement to travel at Government expense by means of a round trip to the United States and not yet having completed a new tour of duty, was not "eligible for return transportation at Government expense" and therefore not within the scope of the Special Provisions.[2] At the meeting plaintiff indicated that he did intend to request duty status and that the letter of appeal he had prepared so indicated. Colonel Larsen told plaintiff that the letter was unacceptable and instructed plaintiff to redraft the letter requesting annual leave or leave without pay. Despite their objections, plaintiff and his counsel submitted a revised letter on April 9, 1965, which com-

[2] There is no contention that plaintiff qualified as one who could not remain overseas because of immigration or repatriation requirements.

plied with that direction. By letter of April 12, 1965, Colonel Larsen amended his original decision to permit plaintiff to utilize his annual leave and then continue in leave without pay status. The decision stated:

> 3. * * * However, in order to minimize personal hardship to you and your family during the period of appeal, paragraph 1, reference 1c is amended to delete 12 April 1965 as the effective date of your removal. I find no justifiable basis for continuing you in a duty status pending the receipt of a decision on your appeal. I do approve your request for annual leave and leave without pay during this period beginning at 0730, 13 April 1965. * * *

This enabled plaintiff to retain commissary, post exchange and other similar privileges through September 17, 1965.

Defendant's position is that plaintiff is not entitled to the benefit of the Special Provisions for Oversea Employees because, having just taken advantage of his biennial reemployment leave and round-trip transportation to the United States, under the Civilian Travel Regulations he became obligated to serve an additional 2 years before becoming "eligible for return transportation at Government expense" within the meaning of the special provision.

The Civilian Travel Regulations, CPR T3, (June 1961) provide (para. 1–6) that each new or current employee selected for assignment to an oversea official duty station is required to sign a transportation agreement prescribing a stipulated period of oversea duty before transportation at Government expense to the oversea area may be authorized and that he has a vested right to return transportation only upon completion of the prescribed period of service (here 2 years). The standard transportation agreement, which is attached to the regulations, provides for round-trip transportation of such employees, their immediate families, their household goods and personal effects at Government expense, but employees are not eligible for the return portion if they separate voluntarily or are separated involuntarily because of misconduct prior to completion of the agreed period. Paragraph 2–11 of the regulations allows and encourages employees, upon completion of the minimum period of service and execution of an agreement for a new tour of duty, to

utilize this transportation for "reemployment leave" in the United States. The prescribed tour for the new transportation agreement then begins as of the date the employee returns to work. (Para. 2–11.*a.*)

The travel regulations set forth qualifications for return "transportation entitlement" from an oversea duty station to place of residence. (CPR T3.2–4.*c.* (June 1961).) In addition to completion of the agreed minimum period of service, these include the requirements that the employee has been reassigned or transferred from, or recruited in the United States; or, if he is a United States citizen hired locally, that he maintain bona fide residence in the United States. For purposes of such entitlement an individual is considered to have prima facie residence in the United States if his status at the time of employment was that of student formally enrolled in a recognized institution of learning, traveler absent from the United States for not more than 6 months, member of the Armed Forces separated locally for the express purpose of accepting Federal employment, or employee of another Federal agency, instrumentality, Government contractor, international organization, or other activity operating in support of the United States or its personnel, if the individual was recruited in the United States under conditions of employment which provided for return transportation.

It is apparent that even for purposes of the travel regulations the meaning of a term such as "eligible for return transportation at Government expense" would depend upon the context in which the phrase appeared. For example, paragraph 1–6 provides that upon completion of the prescribed period of service the otherwise qualified employee has a "vested right" to return transportation at Government expense. The implication is that completion of the minimum period of service results in "vesting" and that prior to that time one is eligible if he eventually meets the other conditions for return transportation at Government expense. Similarly, paragraph 2–4.*c.* provides that to avoid misunderstanding and disagreement at a later date as to meeting the conditions, "*entitlement to return transportation will be determined at time of appointment and recorded through execution of* [*the*] *transportation agreement*" (emphasis in original). It is obvious that in such context "entitlement"

means qualified other than by completion of the service period. "Eligible" would certainly appear to mean less than "vested" or "entitled".

It is concluded that in the context of the Grievance and Appeal Procedures (CPR E2) Special Provisions for Oversea Employees (section 5–8), the provision for allowing employees "eligible for return transportation" who are appealing removal actions to remain in duty status pending disposition of their appeals is not limited to the time after they have completed their periods of service.

It is important to note that the special provision covers not only employees eligible for return transportation but two other groups, to wit:

> [A] United States citizen employee serving overseas who is eligible for return transportation at Government expense, or, who is ineligible for such transportation but who cannot remain in the oversea area after separation because of immigration requirements and/or agreements requiring repatriation to the country of residence * * *.

The regulations contain no explanation as to the reason why the three categories of employees are to be retained in duty status pending appeal of their discharge for cause, or as to what common purpose is served by similar treatment for those eligible for return transportation, those who cannot remain in the area because of immigration restrictions, and those who must be repatriated. Nor does defendant suggest any common denominator. Absent any other interpretative aid, it is inferred that the purpose of the Special Provisions for Oversea Employees is to insure that a United States citizen who would be unlikely to be able to find foreign employment because of cultural or legal impediments will not be effectively deterred or hampered in the exercise of his right to appeal his discharge to the major command level by his inability to support himself in the foreign area while the appeal is pending.

In the context of the Grievance and Appeal Procedure a "citizen employee * * * who is eligible for return transportation at Government expense" is one who is a resident of or is reassigned or transferred from or recruited in the United States, or if hired locally maintains bona fide residence in the United States and has not been absent for more

than 6 months, or was a student or member of the Armed Forces or employee of another Federal or similar agency who transferred for the purposes of obtaining the particular employment, i.e., all those covered by a transportation agreement, whether or not the right to the return portion has matured. A regulation that an employee who meets the above requirements is not eligible to remain in duty status pending the appeal from his removal because he does not have 2 years of service since his last home leave, while at the same time one who does not meet such requirements but is barred from remaining in the area by immigration restrictions or international repatriation agreement is entitled to duty status after only one day's employment would create a discrimination without discernible purpose. Under defendant's construction, the only persons who would ever be "eligible for return transportation," and therefore entitled to remain in duty status, would be those who had completed their minimum service but had not yet exercised their right to reemployment leave. This would mean that an employee could come within the protection of the special provisions only once every 2 years, and then remain eligible for this protection for probably only a few months at most. Such an anomalous construction would appear to defeat the purpose of the special provisions.

A second factor that makes the Government's interpretation untenable is that the same prerequisite, *i.e.*, "eligible for return transportation at Government expense," applies to retention in leave status, which Colonel Larsen granted without hesitation. If plaintiff was not within the class of persons to whom the special provisions applied, then obviously he could not be afforded *any* of the protections or rights created therein. The introduction to the special provisions identifies those employees for whom a discharge action must be processed in accordance with the special procedures. Paragraph *c* begins by providing that an employee requesting to remain in the command "will be retained at the installation in a duty status pending the hearing and final disposition of the appeal at the major command level". If it is inappropriate to keep him in duty status, a separate suspension action must be processed with appropriate notice and hearing procedures.

If the employee abandons his right to duty status and *voluntarily* requests annual or without pay leave status then this may be granted. The regulations emphasize the need for voluntariness by italicizing the phrase "*provided the submission of a written request for such leave is a completely voluntary action on the part of the employee.*" The emphasis is reinforced by the next sentence which warns that "[e]nforced annual leave will not be directed by the installation for the purpose of removing the employee from a duty status." It would seem, therefore, that by telling plaintiff he was not eligible for duty status yet requiring him to rewrite his request for annual and without pay status, Colonel Larsen was able to obtain pro forma compliance with the requirement of voluntariness and immediately remove plaintiff from the command. Plaintiff should now be compensated for the period he was wrongfully deprived of duty status.

III

There is no dispute that the acts charged were in fact done. Plaintiff's principal plea is that the penalty of removal was too harsh in the light of both the nature of his single transgression and his long history of unblemished and superior Government service.

Recent decisions of this court have outlined the limited review functions of this court with respect to penalties. In *Grover* v. *United States*, 200 Ct. Cl. 337, 353 (1973) the court asserted:

> * * * This court has stated on many occasions that the measure of the penalty is within the discretion of the agency. *Birnholz* v. *United States*, 199 Ct. Cl. 532 (1972); *Heffron* v. *United States*, 186 Ct. Cl. 474, 484, 405 F. 2d 1307, 1312 (1969); *Liotta* v. *United States*, 174 Ct. Cl. 91, 96 (1966); *De Nigris* v. *United States*, 169 Ct. Cl. 619, 625 (1965). There are, of course, exceptions to this general rule where it can be shown that the decision made by the agency was the product of abused discretion. The test for the abuse of discretion requires a showing by the plaintiff that the penalty is so harsh that there is "an inherent disproportion between offense and punishment." *Heffron* v. *United States*, *supra*, 186 Ct. Cl. at 485, 405 F. 2d at 1312–13; *Clark* v. *United States*, 162 Ct. Cl. 477, 484 (1963).

However, when such abuse of discretion has occurred, the court has not hesitated to set aside penalties, whether or not they have been within the range of permissible alternatives. *Clark* v. *United States*, 162 Ct. Cl. 477, 482–86 (1963); *Jacobowitz* v. *United States*, 191 Ct. Cl. 444, 458–59, 424 F. 2d 555, 563 (1970); *Cuiffo* v. *United States*, 131 Ct. Cl. 60, 68–70, 137 F. Supp. 944, 949–50 (1955); *Power* v. *United States*, *ante* at 126, 531 F. 2d 505 (1976); *cf. Daub* v. *United States*, 154 Ct. Cl. 434, 292 F. 2d 895 (1961).

Civilian Personnel Regulation C2 (Feb. 1964) provides that the severity of disciplinary action is left to the discretion of appropriate officials of the employing activity (para. 4–2.*a.*), but it does set out a list of suggested penalties. For the applicable offense, "False statements, misrepresentation, or fraud in application blank or other official records submitted to the Department of the Army", the suggested range of penalties for a first offense is "5- to 10-day suspension, or removal." (CPR C2, app. B, Table I (Feb. 1964).)

The trial judge concluded that, although the sanction of removal fell within the range of authorized penalties, the Department of the Army had abused its discretion in this instance. His main ground for this result was that the Department was under the misapprehension that, as a GS–12, Rifkin would never have been entitled to first-class carriage—that the line was always drawn between GS–12's and GS–13's—and therefore that he deliberately intended to and did defraud the United States by changing his travel orders to show that he was a GS–13. The trial judge said: "The undisputed testimony was that there was no fixed dividing line between grades entitled to first class and grades entitled only to lesser accommodations. On some sailings GS–12's were assigned first-class accommodations. It all depended on the blocks and mixes of accommodations booked in advance for a particular sailing by the MSTS officer in charge as compared to the actual demand therefor. Thus, it appears that assignment of preferred accommodations in order of rank or grade was merely an orderly method of allocation to suit the requirements of a particular day's reservations. Accordingly, while plaintiff's use of an altered travel authorization falsifying his grade was unquestionably an improper act

designed to obtain an unwarranted advantage over others, it does not necessarily follow, as Colonel Larsen assumed and his superiors accepted, that it was designed to or in fact did defraud the United States out of money or moneys worth to which under no circumstances was the plaintiff entitled."

In addition the trial judge relied (as showing abuse of discretion) on (a) testimony by officials at the immediate level of command that plaintiff's motivation was the higher prestige of being considered and treated as a GS–13, not the desire to defraud the United States out of the $351 extra cost of first-class transportation on the vessel; (b) testimony that these first-level officials deliberately put out of their minds, as inappropriate considerations, their personal evaluations of "intent or human frailties, sympathy, or compassion"; and (c) the evidence that these same first-level officials mistakenly thought that they had a choice only between a minimal punishment (such as suspension for no more than 30 days) and the ultimate sanction of removal.

After setting aside, on these grounds, the penalty of removal imposed by the Department, the trial judge held, "[o]n an overall view of the evidence in the record and in light of the permanent adverse effect that plaintiff's single transgression has already had on what was up to then a promising career," that a suspension without pay in excess of 2½ years would be unduly harsh and an abuse of discretion.

We do not agree with this evaluation and analysis and conclude, on the contrary, that the record does not show an abuse of discretion by the Department of the Army.

In the first place we think the trial judge's approach slights the cardinal fact that the ultimate decision was made by the office of the Secretary of the Army. It is that decision we are reviewing, not the first or second level determinations made in Europe. And there is no convincing evidence that the Secretarial level was under the same misapprehensions as the first-level officers who testified at the trial and on whose evidence the trial judge rests so heavily. The grievance examiner had made all the points the trial judge now makes and her recommendation was forwarded up the line. Moreover, in the course of appealing the first-level decision plaintiff's

counsel hammered [3] at his contention that no fraud had been committed against the United States and that there was no rigid classification putting all GS–12's in cabin class. That the departmental Employment Policy and Grievance Review Board considered all aspects of the case is also suggested by the fact that on its own initiative it specifically asked the European command for "a comprehensive report with respect to the bases for the first level review decision, consideration given to assessment of lesser penalty, equity of decision in appellant's case when compared to certain 'similar' cases involving military personnel, and to the activity commander's intention to replace appellant with a military officer." [4] The Board came to its first decision only after receiving this report from Europe. After its attention was called to the *ex parte* communications discussed in Part IV *infra*, the Board reopened the proceedings to allow plaintiff's counsel to comment on the hitherto *ex parte* communications and then reaffirmed its conclusion. Finally, the Board devoted a substantial part of its initial report to the aptness of the penalty and in that connection considered (and disagreed with) the grievance examiner's recommendation. All in all, we cannot say that at the Secretarial level—whatever may be said of the first-level decision—the Department of the Army was under a misapprehension as to the pertinent facts or as to its full discretion and powers with respect to the scope of the penalty. That subject appears to have been given ample and careful consideration in Washington.

Second, it was not wrong for the Army to characterize plaintiff's conduct as defrauding the United States. The fact is that on the particular voyage Mr. Rifkin (as a GS–12) was not entitled to first-class accommodations. By showing his travel authorization, which he had deliberately altered to state that he was a GS–13, he persuaded the purser to give him a first-class cabin on that trip. This cost the Government an additional $351. It is irrelevant that on some other crossing he might, as a GS–12, have been entitled to a first-class room. On the particular trip in question he was not so en-

[3] Especially at the grievance hearing and in his brief which was forwarded to the Secretary of the Army.

[4] The quotation is from the first report of the Employment Policy and Grievance Review Board.

titled and he nevertheless sought to obtain that advantage by exhibiting an altered copy of his travel orders. It cannot be gainsaid that on that specific trip plaintiff's actions cost the Federal Government an extra $351 which it would not have had to pay if he had not falsified his grade and which it was not required to pay under the cabin-demarcation pattern adopted for that voyage. Even in technical terms this was the misuse of an official document to defraud the United States. In more colloquial usage, allowable in civil adverse action proceedings, the United States is defrauded when an employee deliberately alters an official document so as to misrepresent its content for his own advantage. As we have said, there is no sufficient evidence that, when the case was decided at the Secretarial level, there was any misunderstanding by either side as to what was here involved in the concept of "defrauding the United States." Whether or not that terminology would be correct in a criminal information or indictment, we think that it was not inappropriate for this adverse action proceeding. That Mr. Rifkin's primary *motivation* may have been to enhance his own prestige rather than to cheat the Government does not serve to eliminate the element of fraud. He knew that he was a GS–12 not a GS–13; he deliberately altered the travel orders to show incorrectly that he was a GS–13; he deliberately exhibited the altered orders in order to obtain a substantial advantage aboard ship; he knew that his elevation to first-class would cost the Government more money; and he was ready to cause that result in order to obtain the prestige (and comfort) of being considered a GS–13. The psychological motivation for these intentional and deliberate acts of cheating does not take the offense out of the category of defrauding.

Third, unlike the trial judge we cannot bring ourselves to hold that, in all the circumstances, the penalty of removal was unduly harsh or an abuse of discretion. The improper act was a knowing, willful and deliberate one—a few days before his trip plaintiff had directed his secretary to alter the grade and salary designation on his travel authorization and then to have the changed document reproduced in several copies; after discussing with the purser aboard the ship the possibility of obtaining first-class accommodations and learning that GS–13's had such treatment he presented one

of the altered copies to the purser in order to show that he was a GS–13; upon debarking at New York plaintiff made arrangements for his return travel, again submitting the altered travel form; but after the disclosure of the alteration he requested the return of the incorrect forms and the substitution of correct ones before the return trip. The Army could rightly hold on this record that plaintiff knew what he was doing and knew that it was wrong. And as the departmental board stressed, Mr. Rifkin was a relatively high-level employee in a position of great trust. When such an employee deliberately changes an official document so as to make it falsely represent his status, in significant fashion, and then deliberately uses it so as to obtain a substantial advantage for himself, removal cannot be branded as disproportionate to the offense. *See Birnholz* v. *United States*, 199 Ct. Cl. 532 (1972); *Grover* v. *United States*, 200 Ct. Cl. 337, 353–354 (1973); *Hoover* v. *United States*, 206 Ct. Cl. 640, 648–49 513 F. 2d 603, 607–08 (1975).

It is not hypocrisy or lip-service to repeat that we are not allowed to substitute our judgment for that of the Army, that we can set aside the punishment only when we consider it an abuse of discretion or disproportionate to the offense. We cannot exercise clemency or give way to our sense of compassion in the same manner the employing agency can. This is another case in which a single misstep may ruin an employee's otherwise unblemished career but we do not feel that the offense is so slight or the punishment so disproportionately heavy that as judges we can intervene—whatever we might have or might not have done as administrators. The responsibility for discipline lies with management and in this instance, though the sanction may have been severe, management's discretion was not abused.

Fourth, the decisions in which we have set aside or reduced punishment, as unduly severe or disproportionate to the offense, are quite different from this. In *Clark* v. *United States*, 162 Ct. Cl. 477 (1963), the most serious offense was the occasional misuse of a Government-owned automobile by the employee's family for private shopping; removal was plainly too harsh for such minor misconduct. *Id.* at 483–84. In *Jacobowitz* v. *United States*, 191 Ct. Cl. 444, 424 F. 2d 555 (1970), the only surviving offense was failure to promptly

process checks received from certain taxpayers. "This charge was minor in nature, was old, and plaintiff had already received a reprimand for it from his superior." *Id.* at 459, 424 F. 2d at 563. In addition, government counsel tacitly agreed at oral argument that the employee would not have been discharged under that count if the other more serious (but reversed) count were not in the case. *See id.* at 458, 424 F. 2d at 563. As its opinion demonstrates, our recent decision in *Power* v. *United States*, *ante* at 126, is likewise no precedent here: "Defendant failed to substantiate a serious charge of alteration of weight tickets, but continued to advocate dismissal based on two minor discrepancies. There is some doubt whether plaintiff actually filed *false* information, and there is even greater doubt that plaintiff submitted the *de minimis* claims *knowingly*, *intentionally* and with the purpose to defraud the Government. The year's delay in bringing about plaintiff's removal poses yet another question concerning the fairness of the overly harsh penalty." *Ante* at 134–35 (emphasis in the original text).

IV

The court's remand order of April 27, 1973, requested resolution of the issue with respect to the use of *ex parte* evidence against plaintiff. In *Camero* v. *United States*, 179 Ct. Cl. 520, 525–27, 375 F. 2d 777, 779–81 (1967) and *Jarett* v. *United States*, 195 Ct. Cl. 320, 330–32, 451 F. 2d 623, 628–29 (1971), the court held that the Government's *ex parte* communications concerning the merits of a case to those responsible for the decision in proceedings prescribed by regulations to be based on evidence and adversary in nature invalidated a decision adverse to a Government employee.

Plaintiff alleges the improper use of at least 12 *ex parte* documents during the administrative appellate proceedings without the knowledge of plaintiff or his counsel. Plaintiff, however, identifies only one document, Colonel Larsen's Memorandum for Record of May 20, 1965, sent to the Commanding Officer of the United States Army Communications Zone (COMZ) at Orleans. This document was not a communication to one having the responsibility for a decision in an adversary hearing on evidence; the purpose, as testified to by Colonel Larsen, was routine—to keep his own commander,

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General Kyser, informed on matters pending within the Procurement Agency command.

When the American Federation of Government Employees (AFGE) raised the *ex parte* issue with the Army, plaintiff's counsel was furnished three documents:

(1) The memorandum from the Employee Appeals Review Board to a Deputy Chief of Staff of the Commander in Chief, Europe, dated July 27, 1965, setting forth its recommendations with respect to plaintiff's appeal and the grievance examiner's report.

CPR E2.5–5.*a.* (Change 2, July 30, 1963) allows the major commander to "prescribe the methods and procedures" for review, on the merits, of the transcript of the grievance hearing and the examiner's report. Pursuant to this authority, an Employee Appeals Review Board was set up by CINC US AREUR to review the record and to make recommendations to him. It was not unreasonable for the Commander in Chief, Europe, to seek assistance from his staff, the members of which had not been involved in the case. The board made a complete review and report. This appears to be allowable under the regulations, and since the panel's review was not an adversary hearing it was not inherently unfair or prejudicial.

(2) The comments on plaintiff's appellate brief that were furnished the Secretary of the Army by the Commander in Chief, Europe, on March 2, 1966.

This was prepared pursuant to a request by the Secretary of the Army for further information concerning the issues raised in plaintiff's appellate brief to the Secretary. The request sought information with respect to: (a) basis for determination that removal rather than a lesser penalty was warranted, as recommended by examiner; (b) circumstances of the major "B" case, urged by plaintiff to show discriminatory treatment; and (c) intention of Colonel Larsen to fill the comptroller position with a military officer, also claimed by plaintiff.

With regard to an appeal to the Secretary of the Army from a major commander's decision, CPR E2.5–6.*a.*(1) (Change 2, July 30, 1963) provides:

> The employee's request for review will be added to the appeal record along with any comments the activity commander or major commander wish to make, and will be forwarded through channels to the Office, Secretary of the Army. * * *

Since the regulations providing for such appeal specifically contemplate "comments" by the activity and major commander, and are silent concerning making such comments available to an appellant, it appears that such documents were proper.

Moreover, since the delegate of the Secretary of the Army made both documents (1) and (2) available to plaintiff, gave plaintiff's counsel an opportunity to file a brief in response thereto and reconsidered his decision in the light of such brief, plaintiff has not been deprived of any rights granted by the regulations or which affect the basic fairness of the appeal proceeding.

(3) A July 2, 1965 letter from COMZ (Major General Kyser) to Commander in Chief, Europe.

Colonel Larsen had been keeping his immediate superior, Major General Kyser (COMZ), informed of his actions with respect to the Rifkin matter. After the grievance examiner's report was issued on July 2, 1965, General Kyser unilaterally wrote to the Commander in Chief, Europe, before whom plaintiff's appeal was pending, without furnishing a copy to plaintiff, urging that the recommendations of the grievance examiner not be followed and that the removal be sustained. He stated "[t]hat fraud against the United States was committed is adequately established"; the removal of an employee in a position of trust who has failed with respect to honesty and integrity is necessary to promote the efficiency of the service; "[t]he retention of an employee who is known to have committed a fraud against the United States" would unfavorably affect the morale, integrity and high standards of conduct of other employees; and plaintiff's fraudulent act could have been the basis of a prosecution which could have warranted a $10,000 fine and 5-years imprisonment.

General Kyser's letter is troublesome. It sought to influence the result of an adversary hearing required to be based on evidence by imposing his own conclusions in the appeal. Since it urged that the grievance examiner's recommenda-

tion for a punishment less severe than discharge not be followed because the plaintiff was guilty of a fraud against the United States which could even have warranted fine and imprisonment, it was certainly prejudicial to plaintiff. Major General Kyser was Colonel Larsen's direct superior and Colonel Larsen testified he conferred frequently with the general and his staff and kept them fully informed on everything he did in the Rifkin case, by memoranda, telephone and personally. Thus General Kyser's perspective and views on the case were derived at least to some extent from Colonel Larsen, who was a party to the appeal. Colonel Larsen also testified that General Kyser was extremely concerned and upset about the Rifkin case and needed no convincing from him to write the letter to higher headquarters expressing his views about the case while the appeal was pending. The letter was in fact considered by the Commander in Chief, Europe, and his staff, in deciding the appeal, since it is expressly referred to in the memorandum dated 27 July 1965 from a panel set up by him, and is quoted in the letter to the Secretary of the Army dated 2 March 1966.

General Kyser's letter of July 2, 1965, states that it is in compliance with USAREUR Regulation 690–32, paragraph 6(b) (Feb. 8, 1965). It is not clear that such regulation, which is set out below,[5] does authorize an *ex parte* communication of the sort at issue here. In any event, if it did, a regional regulation which would authorize *ex parte* comments such as those of General Kyser's would be inconsistent with the entire adversary and evidentiary grievance procedure set up by the Army Civilian Personnel Regulations.

The trial judge concluded that General Kyser's letter was so prejudicial to plaintiff as to destroy his right to a fair and impartial hearing before the Commander in Chief, Europe. The trial judge then went on to say that it was

[5] "6. *Processing Appeals From Adverse Actions.* a. An information copy of the Report of Inquiry and Grievance Record, which is forwarded directly to the Personnel and Administration Division, Headquarters USAREUR (CPR E2.5–4b), will be transmitted to the appropriate area commander. When the activity concerned reports directly to a staff division of Headquarters USAREUR, a copy of the Report of Inquiry and Grievance Record will be forwarded to the head of that staff division.

b. Immediately on receipt of the copy of the Report of Inquiry and Grievance Record by the commander indicated in a above, a qualified staff officer will be designated to analyse the appeal and recommend appropriate action."

unnecessary for him to decide, since he had already determined that the penalty should be vacated for other reasons, whether the reconsideration of its decision by the Office of the Secretary of the Army after plaintiff was allowed to respond to the three *ex parte* documents (including General Kyser's letter) was enough to cure the unfairness in the appeal to the major commander (Commander in Chief, Europe).

Unlike the trial judge, we must directly face the impact in these proceedings of General Kyser's communication. We hold that any error at the European level in receiving and considering this letter *ex parte* was cured and rendered harmless at the level of the Secretary of the Army. There the document was made available (along with the other two) to plaintiff, and his counsel had the opportunity to comment on the letter; thereafter the Employment Policy and Grievance Review Board reconvened to reconsider the matter and the office of the Secretary reconfirmed its decision upholding the removal. It is the decision of the office of the Secretary that we are now reviewing—not the lower level decision of Colonel Larsen or of the Commander in Chief, Europe—and by the time the decision at the Secretarial level was finally made and issued there was no longer any *ex parte* influence on, or communication to, the deciding authority. Our ruling with respect to General Kyser's letter is the same as the holding of the trial judge (and ours) with respect to the other two *ex parte* documents. *See supra.*

V

We add a few words on laches. Because we sustain the defendant in removing plaintiff, we need not consider whether his broad claim would be barred in whole or in part by laches. We have, however, allowed him recovery of back pay for the early period from April 13, 1965 to August 30, 1965 (the period during which he was entitled to remain in duty status). *See* Part II, *supra.* Even if laches were to bar the rest of his claim, there is authority for carving out this early period. In *Chappelle* v. *United States*, 168 Ct. Cl. 362 (1964), although the suit was brought more than five and one-half years after accrual, the court struck down a defense

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of laches because the employee himself limited the claim to an early period for which he would have been entitled to recover had he brought suit more promptly. *See also Cason* v. *United States*, 200 Ct. Cl. 424, 471 F. 2d 1225 (1973). The same principle applies here with respect to the April 1965–August 1965 period for which back pay is awarded. Moreover, none of the factors which induce the application of laches is present for this part of the claim—the issue is purely one of law and there is no problem of lost records, unavailable witnesses, or faded memories; nor would the Government have been saved a double salary for this period if plaintiff had sued earlier.

CONCLUSION OF LAW

Plaintiff is entitled to recover only his back pay for the period from April 13, 1965 to August 30, 1965, and the amount thereof will be determined in further proceedings under Rule 131(c). Plaintiff is not entitled to recover on any of the rest of his claim and that portion of the petition is dismissed.

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534 F. 2d 274

REL-REEVES, INC., SUCCESSOR TO DYNAMICS CORPORATION OF AMERICA v. THE UNITED STATES; DIGITAL RESOURCES CORPORATION, THIRD-PARTY DEFENDANT

[No. 258–67. Decided April 14, 1976]

ON THE PROOFS

Patents; infringement; license; estoppel; proprietary information; trade secrets.—Plaintiff seeks reasonable and entire compensation under 28 U.S.C. § 1498 for alleged unauthorized use or manufacture by or for the Government of an invention relating to a method and apparatus for checking electronic analog computers disclosed in U.S. Patent No. 2,967,997, and as claimed in claims 7, 8 and 13 covering a structural combination capable of statically testing all components except the integrator capacitors of an analog computer. In addition to the defense of noninfringement, defendant contends that it has a royalty-free license under the patent and that plaintiff is equitably estopped, by its false representations and concealment of material facts, from denying that defendant has an implied

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royalty-free license under the patent in suit. It is *held* (1) that the accused system as shown by drawing X500C infringes claims 7, 8 and 13; (2) that defendant did not have any reproduction rights in plaintiff's 1954 invention under the Background Patents Rights Clause of the 1951 Navy Contract NOas 52-1142-c because the contract was completed by that time, and the language of the form letter of June 21, 1955 cannot be taken to mean that the contract had not been completed; (3) that Navy Contract NOas 54-545-c did not contemplate nor require any research and development work in the field of problem check, that defendant has failed to show that the invention was conceived or first actually reduced to practice in the performance of the experimental, developmental or research work called for by said contract, and has failed to show that the inventor was involved in any of the work done by plaintiff under the contract, and that accordingly defendant is not licensed under the patent; and (4) that defendant has not established that plaintiff is estopped to deny the existence of a royalty-free license because of concealment of material facts from the Air Force during preliminary discussions concerning the latter's computer facility. Claims 7, 8 and 13 are valid and have been used and/or manufactured by or for defendant, without authorization or license from plaintiff and plaintiff is entitled to recover reasonable and entire compensation therefor. Judgment is entered for plaintiff, with the amount of recovery to be determined in further proceedings.

Patents; application and proceedings; amendment of application.

[1] The claims of a patent application may be amended to assure complete protection for what applicant originally intended to reserve for himself and to make express what amounts to nothing more than an equivalent of the original disclosure and claims.

Patents ⟸ 109

Patents; application and proceedings; amendment of application.

[2] There is nothing inherently wrong or dishonest in amending claims during prosecution of a patent application in order to insure that the claims which ultimately appear in the patent will cover the commercial activity of third parties whose potentially infringing activities are discovered subsequent to the filing of the application, so long as the claims are supported by the original application disclosure.

Patents ⟸ 109

Patents; claims define invention.

[3] It is hornbook law that the claims of a patent set forth the formal definitions of the invention and must be looked to in determining if there has been infringement.

Patents ⟸ 165(2)

Patents; claims; construing and interpreting; generally

[4] While a claim of a patent cannot be limited or expanded to give a patentee something other than what is claimed, courts are not con-

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fined to the language of the claims in interpreting their meaning, but it is necessary to resort to the patent specification, its drawings and its file wrapper; however, at the same time claim interpretation should be done on a reasoned basis to avoid unjust results.

Patents ⇐ 165(2), 167(1)

Patents; license; evidence; invention related to Government contract.

[5] While it is not necessary in all circumstances to introduce into the record before the court the complete contract under review, supplemental testimony is required to show that the missing portions were insignificant and/or had no impact on the issues at bar. Thus, where defendant argues that the invention covered by the patent in issue is an improvement which comes within the terms of the Background Patents Rights Clause of the patentee's contract with the Government and that it accordingly should be granted a license under the patent, since defendant has failed to provide the court with a complete copy of the contract and has introduced no testimony to show that later amendments did not modify the clause in question although given the opportunity to do so, the court must reject the contention for failure of proof.

Master and Servant ⇐ 62

Patents; licenses; research and development contract; extent of license.

[6] The license rights clause in Government contracts is not restricted to situations where every component of the invention has been discovered in the course of contract performance. The issue of license *vel non* should be approached liberally by asking what the United States (acting for its taxpayers) can fairly be held to have purchased through its sponsorship of the contract project. The Government has the right to use, royalty-free, those ideas, improvements, discoveries and invention—crystallized during performance of the contract—which have a close and umbilical relationship to the work and research funded by the United States. Where the facts show that the invention was not conceived in the performance of the experimental, developmental or research work called for by the contract and where it has not been shown that the inventor was in any way involved in any of the work done by his employer under the contract, a license to the Government does not exist.

Master and Servant ⇐ 62

Estoppel; equitable estoppel; nature and essentials; generally.

[7] The elements necessary to establish the defense of estoppel are: (1) the party to be estopped must know the facts, (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended, (3) the latter must be ignorant of the true facts, and (4) he must rely on the former's conduct to his injury.

Estoppel ⇐ 52.15

Per Curiam

Words and phrases; proprietary information.

[8] "Proprietary information" means information which originates with or is peculiarly within the knowledge of its owner, or those in privy with him, that is not available to the public and is protectable as a trade secret property right.

Master and Servant ⇐ 60

Trade secrets; generally.

[9] Courts are reluctant to elevate an untested idea to the status of a proprietary right without some proof that the physical means for putting it to use exists.

Master and Servant ⇐ 60

Trade secrets; generally.

[10] One of the requisites of a trade secret is that the possessor take reasonable measures to protect its secrecy.

Master and Servant ⇐ 60

Patents; contracts with Government; disclosure of patents and applications.

[11] A letter from a Government procurement officer requesting plaintiff to furnish preliminary data for planning purposes in connection with operation of an analog computer facility did not require plaintiff to disclose plans for filing a patent application to protect its problem check idea, since in evaluating submissions and carrying out negotiations for Government contracts, it is established Government practice to ignore patents and applications; the availability of 28 U.S.C. § 1498 as a remedy for a patent owner requires the Government to accept advertised bids which are alleged to infringe a patent.

United States ⇐ 97

Thomas P. Dowling, for plaintiff. *George B. Finnegan, Jr.*, attorney of record. *Kurt E. Richter*, of counsel.

Ronald Snider, with whom was *Assistant Attorney General Rex E. Lee*, for defendant. *W. Boswell Childs*, of counsel.

Michael P. Breston, attorney of record, for third-party defendant.

Before DAVIS, NICHOLS, and BENNETT, *Judges*.

PER CURIAM: This case comes before the court on defendant's exceptions to the recommended decision of Trial Judge Joseph V. Colaianni, filed April 30, 1975, pursuant to Rule 134(h), having been submitted on the briefs and oral argument of counsel for plaintiff and defendant. Upon consideration thereof, since the court agrees with the trial judge's

recommended decision, as hereinafter set forth,* it hereby affirms and adopts the same as the basis for its judgment in this case. It is therefore concluded that claims 7, 8 and 13 of United States Letters Patent No. 2,967,997 are valid and have been used and/or manufactured by or for defendant, without authorization or license from plaintiff and that plaintiff is entitled to recover reasonable and entire compensation therefor. Accordingly, judgment is entered for plaintiff to that effect with the amount of plaintiff's recovery to be determined pursuant to Rule 131(c)(2).

OPINION OF TRIAL JUDGE

COLAIANNI, *Trial Judge:* Plaintiff, Rel-Reeves, Inc., seeks reasonable and entire compensation under 28 U.S.C. § 1498 for unauthorized use by the Government of its patented invention. The issue of liability is the only one presently before the court. An accounting trial, if it becomes necessary, will be held after the issue of liability has been finally adjudicated.

The patent in suit, United States Letters Patent No. 2,967,997 (hereinafter referred to as the "McCoy" patent), issued on January 10, 1961, on an invention entitled, "Method and Apparatus for Checking Electronic Analog Computers." All rights in the patent were assigned by Rawley D. McCoy, the inventor, to Reeves Instrument Corp. As a result of a series of mergers and sales, the patent in suit and all claims thereunder, including the present suit, are now owned by Rel-Reeves, Inc.

Although defendant's answer and amended answer originally contested the validity of the McCoy patent, validity no longer is an issue. In defendant's own words:

> The issue of validity of these claims [7, 8 and 13] is no longer contested by the Government in view of the settlements in related patent suits brought by plaintiff against two of the Government's indemnifying suppliers of accused computers. Beckman Instruments, Inc. * * * and Electronic Associates, Inc. * * *. The issue of validity was fully litigated in *Reeves Instrument Corpora-*

*Whereas the court adopts the trial judge's separate findings of fact which are set forth in his report filed April 30, 1975, they are not printed herein since such facts as are necessary to the decision are contained in his opinion.

tion et al. v. *Beckman Instruments Inc.*, 161 U.S.P.Q. 450 (C.D. Cal. 1968), affirmed, 444 F. 2d 263, 170 U.S.P.Q 74 (C.A. 9th, 1971), cert. denied 404 U.S. 951 (1971).

Defendant, accordingly, now bases its defense against plaintiff's charge of infringement on: (1) the existence of either an express or implied license under the McCoy patent; and (2) the argument that the claims at issue should be narrowly construed to prevent them from covering the apparatus procured and/or used by it. Defendant thus urges that the following issues are to be resolved by this court:

(a) Whether the terms of Navy Contract NOas 52–1142–c granted the United States a royalty-free license to practice the "problem check" improvement covered by the McCoy patent;

(b) Whether the United States is entitled to a royalty-free, express license under the "subject invention" clause of Navy Contract NOas 54–545–c;

(c) Whether the plaintiff should be equitably estopped to deny the United States has an implied royalty-free license in the McCoy patent; and

(d) Whether, upon failing to find that defendant has established either an express or implied license, claims 7, 8 and 13 of the McCoy patent should be narrowly construed to cover only the "first-order loops" of analog computers.

For reasons hereinafter set forth, it is concluded that the patent is valid and the inventions covered by claims 7, 8 and 13 have been used and/or manufactured by or for defendant without authorization or license from plaintiff.

Background

The patent in suit relates to a method and apparatus for checking electronic analog computers. The patent discloses and claims both a "dynamic" and "static" checking apparatus; however, the claims at bar, Nos. 7, 8 and 13, are only directed to static checks.

The importance of electronic computers as design tools was recognized at least as early as the April 20, 1955, filing date of the McCoy patent, and the accuracy of electronic computers even at that early date was sufficiently high to en-

courage such use. While both digital and analog computers were popular and in wide use in the mid-1950's, the McCoy patent is useful only to check components and connections of electronic analog computers. Analog computers, as distinguished from digital computers, employ distinct computing elements for each mathematical operation required to reach the solution of a given problem. The computing elements, or computer variables, are made to obey mathematical relations analagous to the variables of the original problem, and recordings, or measurements, of the behavior of the computer elements provide the solutions to the problem under study.

The variables of the analog computer described in the McCoy patent are represented by d.c. voltages that vary with time. The principal computing elements in such a computer is a d.c. amplifier with a capacitive feedback network, otherwise known as an integrator circuit. Moreover, analog computers are broadly classified as specialized (limited purpose) or general purpose types. General and specialized d.c. analog computers utilize similar machine elements. However, while in specialized computers, the elements are prewired in a fixed-circuit relationship, the computing elements of general purpose computers can be easily rearranged by means of patchcords. Problem parameters are established by the use of adjustable potentiometers or rheostats.

However, the flexibility achieved in a general purpose analog computer by the use of patchcords and adjustable potentiometers makes it vulnerable to the introduction of human error. In addition to its susceptibility to "human" error, errors can also occur because of the malfunctioning of one or more of the many computer components.

In order to increase confidence in the validity of computer solutions, various testing procedures were resorted to by operators of general purpose analog computers. Each of the prior art testing procedures has been found to be deficient for a number of reasons, including the significant number of hours needed to run such tests, the high costs involved to conduct the tests, and the fact that the tests disturbed the patchcord connections and/or potentiometer settings. The McCoy patent, as the following quotation indicates, *see* col. 1, lines 36 to 52, was directed at overcoming these important

prior art limitations in the testing of electronic analog computers:

> Electronic computers are recognized today as being indispensable tools in the field of Dynamic Systems Engineering. Generally speaking, present day electronic computers have excellent accuracy, but this accuracy is meaningful only if the computer setup which includes problem coding, patch connections and scale factor potentiometer settings are free from error and the components of the computer are operating properly. In setting up a computer for the solution of a particular problem, several hundred or more connections and settings may have to be made by the operator and there is always the possibility of human error in addition to the possibility of improper operation of the components in the computer. Hence it is of the utmost importance to be able to check the operation of the computer after it has been set up for the solution of a particular problem in order to establish the validity of the results obtained.

The patent in suit teaches how, through the incorporation of switching relays and appropriate voltage sources within the circuit of each integrator of an analog computer, the connections between the computer components, as well as the proper operation of the components themselves, may be tested. The incorporation of the relays, their associated circuits, and voltages into the integrators eliminated the necessity for an operator to manually modify the connections and settings of the computer both before and after a testing operation. Particularly, the claims at bar disclose and cover a structural combination which is capable of statically testing all components except the integrator capacitors of an analog computer.

The patent in suit, *see* fig. 1 which is reproduced at finding 38, shows the computer setup required to solve a relatively simple missile trajectory problem. The problem setup includes integrators 10 and 16. Fig. 1 shows the existence of a number of computation loops associated with each of the integrators. As shown, one loop comprises integrator 16, electronic multiplier 18, and potentiometer 20. Another loop includes integrator 10, resolver-servo 12, amplifier 15, the amplifier portion 22 of division unit 19, amplifier 23, and

potentiometer 24. In addition, fig. 1 discloses what is commonly referred to as a "second-order loop," because of the inclusion of both integrators 10 and 16, and consists of integrator 10, resolver-servo unit 12, amplifier 14, integrator 16, potentiometer 17, division unit 19, inverting amplifier 23, and potentiometer 24. It is not unusual for a problem to include single integrator loops, loops including two or more integrators, and, as well, loops having no integrators.

Fig. 2 of the McCoy patent, at finding 39, shows a typical integrator circuit with its associated input resistor network, and, as well, the switching networks and voltage sources needed to carry out the patented McCoy invention. While each integrator of the computer will be modified in a similar fashion, only one integrator is shown in fig. 2 for purposes of illustration. Inputs to the integrators are made by way of the input resistor network and associated patchcord connections thereto.

The data flow shown in fig. 1 occurs when the computer is in the "compute" or "operate" mode. However, before the computer is placed in this mode, it is switched to an "initial condition" or "reset" mode. As explained in detail by finding 40, during the "initial condition" mode, the summing junction 29 of fig. 2 is grounded and the computing loops associated with each integrator are opened and each integrator is disabled by connecting a resistor (41 of fig. 2) across integrating capacitor 40. The initial condition voltages which represent the values of the variables at the start of a computation cycle are introduced into the appropriate integrators. These initial condition voltages are disconnected during the problem checking operation and are not used as test voltages during that operation.

After the computer has been set up to solve a particular problem and before initiating the "compute" operation, it is customary to conduct a check of the computer's static elements. As explained by the patent in suit, during problem check, the X and P.C. relays, as shown in fig. 2, are energized and the Y relay is de-energized. As a result, the integrator is converted into a negative feedback amplifier, the connection of the resistor network to the input of the integrator remains undisturbed, and the integrator output (lead 48)

which normally is connected to other computing elements is connected to a source of predetermined test voltage.

The test voltage is translated through various computing elements, multipliers, potentiometers, resolvers, etc., which are connected to the output of the integrator. In this arrangement, the operator can obtain voltage readings at various points in the computer, including the summing junction, and by comparing these voltages with precalculated theoretical voltages for the same test points, determine whether the various computer components and connections are operating properly.

In operation, a test voltage is fed, by way of closed loops formed by the other computing elements and the input resistors, to the terminals of each integrator circuit. (*See* PX 409 accompanying finding 41.) The test voltage then flows through the negative-feedback amplifier 39 to an appropriate voltage measuring device 64.

Since the output leads, which normally carry the signals from each of the integrators to other parts of the computer have been opened, it should be emphasized that the test voltages are only capable of flowing from the output of an integrator, through various computer elements in closed-loop association, to the input terminal of the same integrator. Accordingly, as plaintiff admits, the McCoy invention cannot test open-loop sections, loops that are open in the computation mode, or second and higher-order loops (loops having two or more integrators) of computer setups where there is no shunt path around the additional integrators in such loops which would permit the test voltage to return to the input terminal of an integrator.

In the problem check mode described, the initial derivative signals are transmitted through the input resistor network to the summing junction and passed by the negative feedback amplifier to an appropriate voltage reading device. The patented invention thus permits the checking of various computing elements, including the patch connections to the integrators, the associated patchbay contacts, and the input circuits of the integrators, which consist of the input resistors and the connections to the summing junction.

The Patent Claims

Plaintiff urges that claims 7, 8 and 13 of McCoy are infringed by defendant. While each of the claims are discussed in considerable detail in the findings of fact, for purposes of illustration only, claim 13, the narrowest of the claims at bar, is reproduced in indented form to aid in the identification of its major sections:

> (a) Apparatus for testing an analog computer including at least one integrating circuit, * * *
> (b) * * * said integrating circuit having an input coupled to first terminal means of the remaining elements of the computer and an output coupled to second terminal means of the remaining elements of the computer to form a closed-loop system, the input of said integrating circuit including a series input resistor, * * *
> (c) * * * comprising in combination, means including switching means coupled to said integrating circuit, * * *
> (d) * * * a source of known voltage coupled to said switching means, * * *
> (e) * * * said switching means rendering said integrating circuit ineffective * * *
> (f) * * * and supplying a known voltage to said second terminal means of the computer, * * *
> (g) * * * said known voltage being translated through the remaining elements of the computer to the series input resistor of said integrating circuit, * * *
> (h) * * * and measuring means including amplifier means coupled to said series input resistor for measuring the response of the remaining elements of the computer to said known voltage.

File Wrapper Estoppel

Defendant contends that during the prosecution of its application, plaintiff modified its claims to read on checking circuits that are broader than the McCoy invention. Particularly, defendant argues that the original claims were all limited to "* * * disconnecting the output of the integrator, substituting a 'problem check' voltage for the output, and measuring the output of the disabled integrator." However, defendant charges that by amendment of October 1, 1956, plaintiff added claims that eventually matured into patent

claims 7 and 8 and for the first time omitted the limitation that called for the problem check measurement to be made at the output of the integrator amplifier. As further support for its position, defendant points to a memorandum written by the agent prosecuting the application through the Patent Office. That memo states:

> I would like to draw a set of broad claims if this is possible which will cover not only our own Problem Check invention, but the problem check systems of our competitors.

Defendant thus argues that the purpose of omitting the claim limitation which required that the problem check measurement be made at the output of the integrator, was to—

> * * * preempt a class of checking circuits for analog computers whose principles, structure, design, approach, components, and operation are different from McCoy's invention.

Defendant's arguments find no support in the record and thus must be rejected. To begin, it is not unusual for an applicant to modify pending claims. Indeed, it has long been established that claims may be amended to assure complete protection for what applicant originally intended to reserve for himself and to make express what amounts to nothing more than an equivalent of the original disclosure and claims. *Jones* v. *Sears, Roebuck & Co.*, 187 F. Supp. 293, 127 USPQ 411 (D. Col. 1960), *aff'd*, 308 F. 2d 705 (10th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963).

As explained in findings 50–64, the drawings and specification as originally filed clearly required that voltage readings be made at various points of each integrator loop, including the summing junction. More particularly, col. 4, lines 56–70, states:

> After the computer has been connected with the proper settings for the computation of a particular problem, a static problem check is first carried out. Under such conditions, the relay P.C. is energized and a constant problem check voltage from the potentiometer 53 is substituted in the computer for the output of the integrator. The relay X is also energized and thus, the amplifier does not function as an integrator. This is done for each integrator in the computer and with the introduction of these constant voltages, output voltages will appear at

each component in the computer, the values of which may be read and recorded by the read-out device. *Under these conditions, the outputs of the integrators will be proportional to the initial value of the derivatives applied thereto.* [Emphasis added.]

In order for the outputs of the integrators to be proportional to their input signals, it is necessary that the "initial value of the derivatives" (the input to the integrators) find their way from the input resistor network to the summing junction, through the amplifier to the output terminals of the integrators. This was explained by McCoy to the Patent Office in the amendment of May 12, 1958, wherein he states:

> [I]n the static test of an analog computer, the integrator is disabled, and it is the input voltage at the input of the "disabled" integrator that is to be measured. Nevertheless, while it is the input voltage to the "disabled" integrator that is to be measured, the connection of the digital converter [voltage reading and recording device] 64 remains unchanged [remains connected to read the voltage at the output lead of the "disabled" integrator].

With the understanding that by measuring the output of the converted integrator, McCoy in fact is teaching and accomplishing a measurement of the amplified initial derivative signals which appear at the input of the integrator, it is concluded that plaintiff has from the filing of his application sought to patent the structural combination covered by claims 7, 8 and 13.

Moreover, defendant's charge that plaintiff's amendments were improperly motivated in order to cover the later developments of competitors is equally unpersuasive in view of plaintiff's continuous attempt to claim the inventions covered by claims 7, 8 and 13. In a review of a strikingly similar set of accusations and circumstances, the Southern District Court of Florida has stated:

> There is nothing inherently wrong or dishonest in amending claims in a pending application during the course of prosecution before the United States Patent Office in order to insure that the claims which ultimately appear in the issued patent will cover the commercial activity of third parties, whose potentially infringing activities are discovered subsequent to the filing of a

patent application, so long as the claims are supported by the original patent application disclosure. Thus, whether or not * * * [patentee] was spurred into making broader claims in his then pending application by the appearance of the * * * [accused infringers'] publication is irrelevant; and the only legitimate issue of fact or law is whether [the] claims * * * are supported by the original disclosure of the * * * application * * *. [359 F. Supp. at 954–55.] [1]

Equally unmeritorious is defendant's contention that false and misleading statements were made to the Patent Office examiner during the prosecution of the McCoy application that limited the claims in suit to the circuit specifically illustrated in the drawings. Defendant particularly complains that the October 1, 1956, amendment which added application claims 15 and 16 (patent claims 7 and 8)—

(1) for the first time recited that the input to the integrators was to be measured; and
(2) for the first time added the limitation of closed feedback loops.

These arguments have in part previously been treated and it, therefore, is only necessary at this point to discuss defendant's contention regarding the added closed-feedback loop limitation. A review of the specification, drawing and claims as filed makes it abundantly clear that in carrying out the problem check operation McCoy intended to open the output lead (48) that connected each of the integrators with the rest of the computer, *see* fig. 2 of the patent. However, at the same time, the test voltage from potentiometer 53 was

[1] *Penn Yan Boats, Inc.* v. *Sea Lark Boats, Inc.*, 359 F. Supp. 948, 175 USPQ 260, 264 (S.D. Fla. 1972), *aff'd per curiam*, 479 F. 2d 1328, 178 USPQ 577. *See also Pursche* v. *Atlas Scraper and Eng.*, 300 F. 2d 467, 476–77 (9th Cir. 1961), 132 USPQ 104, 111–12, *cert. denied*, 371 U.S. 911 (1962), the court stated:

"Nor do any of the remaining attacks on these two claims have merit. Under the doctrine of 'late claiming' as exemplified in such cases as *Muncie Gear Works* v. *Outboard Marine & Mfg. Co.*, 315 U.S. 759, 62 S. Ct. 865, 86 L.Ed. 1171 (1942), a supplemental claim adding new matter to a pending patent application is invalid where intervening use or sale of a device described in the supplemental claim occurred more than one year prior to the filing of that claim. 35 U.S.C.A. § 102(b). It is true that in this case the 090 plow had been in public use for nearly four years before Pursche supplemented his pending patent application with claim 27. But the scope of the invention stated in several claims initially made in that application extended to and included the matter covered in claim 27. Claim 27 added nothing new to the application."

to be "* * * substituted in the computer for the output of the integrator." (Col. 4, lines 60–61 of the McCoy patent.) This test voltage was then translated through the circuit components connected to the output terminals of each of the integrators. Moreover, in order for the "* * * outputs of the integrators * * * [to] be proportional to the initial value of the derivatives applied thereto * * *" (Col. 4, lines 69–70), it is necessary, as previously explained, for the test voltages to eventually find their way back to the input terminals of each of the integrators. This is obviously only possible if closed loops between the output and input terminals of each of the integrators exist.

It is thus concluded that plaintiff intended, from the filing of its application, to cover a combination which included closed-feedback loops. The language of claims 7 and 8 (application claims 15 and 16) did nothing more than expressly state what must be regarded as an equivalent of plaintiff's original disclosure and claims.

In addition, defendant urges that by the October 14, 1959, amendment the claims in suit were—

> * * * clearly limited * * * to circuits in which the test voltage is applied *in place of* the integrator circuit. Applicant thereby excluded from coverage circuits like those in Korn & Korn [*see* figure accompanying finding 67] in which the integrator *cannot* be removed during a static check and in which the static test voltage is applied at the initial condition terminals on the input side of the integrator.

After careful consideration, defendant's argument is found to be unconvincing and must also be rejected. The Korn & Korn prior art disclosed and taught the insertion of an initial condition voltage source at the integrator input, while at the same time requiring that the input resistor network be disconnected. Accordingly, the reference did not disclose a system which was capable of testing the input resistors and associated patchcord connections.

In commenting on the disadvantages of the Korn & Korn circuit over the McCoy invention, the Circuit Court stated in the case of *Reeves Instrument Corp.* v. *Beckman Instruments, Inc.*, 161 USPQ 450 (C.D. Cal. 1968), *aff'd*, 444 F. 2d

263, 267–68, 170 USPQ 74, 78 (9th Cir. 1971), *cert. denied*, 404 U.S. 951 (1971):

> It was established at trial that certain aspects of an analog computer could be checked by applying the initial condition voltage as set forth above and then making certain measurements within the loop (which is open at the input to each integrator) prior to de-energizing the relay and proceeding with the desired computation. It was, however, equally established that this approach to checking had two substantial disadvantages.
>
> The first disadvantage to this approach stems from the fact that not all integrators in a given problem will require an initial condition voltage so that, in order to check the circuitry associated with these integrators, it would be necessary to establish some initial voltage for checking purposes. This voltage would, however, have to be removed prior to running the problem. The chance that the computer operator might forget to remove these checking voltages adds an extra source of possible human error into the system.
>
> The second disadvantage to this approach stems from the fact that it can check only limited portions of the loop. Particularly troublesome is the fact that it was not possible to check the crucial connections on the patch board which connect the input resistors to the integrators nor was it possible to check the integrator summing junctions since the loop is opened at the *input* to each integrator.
>
> In sum, this check was incomplete and, as found by the district court, caused "a disturbance of the problem set-up and an aggravation of the human error problem." Indeed, a Beckman publication characterized these as the "two major loopholes" of the I.C. static check.

Plaintiff's invention, on the other hand, left the resistors and summing junction connections at the input side of the integrator undisturbed. As a result of reading the voltage which appears at the output of the converted amplifier, which, as previously explained, in fact amounts to a measurement at the integrator input, McCoy is able to check the input resistor network, the connections associated therewith, and, as well the connection from the summing junction to the input terminal of the converted integrator.

Accordingly, defendant's arguments that the limitations added to the claims in suit during their pendency in the

Patent Office prevent them from covering the accused circuit are found to be unmeritorious.

Validity

As previously noted, because of settlements reached in suits brought by plaintiff against two of the defendant's suppliers, the validity of claims 7, 8 and 13 is no longer contested by the Government. Defendant agrees that the validity of claims 7, 8 and 13 of the McCoy patent was fully litigated in *Reeves Instrument Corp.* v. *Beckman Instruments, Inc.*, *supra*.

Infringement

Plaintiff urges that the inventions covered by claims 7, 8 and 13 of the McCoy patent have been used or manufactured by or for defendant without license from plaintiff or lawful right. Plaintiff's petition states that analog computers manufactured for defendant by the following companies embody the invention as described and covered by the claims of the McCoy patent:

(a) Beckman Instruments, Inc. (its 1100, 2100 and 2200 series computers);
(b) Electronic Associates, Inc. (its models 16–231R, 16–221R, 680 and 8800, as well as some late versions of 16–24D, 16–31R and 16–131R);
(c) Applied Dynamics, Inc. (its model AD–2–64PBC);
(d) Comcor, Inc., a subsidiary of Astrodata, Inc.;
(e) GPS Instrument Co., Inc.; and
(f) Milgo Electronics Corp. (its model 4010).

By way of its amended answer, defendant denied that it had possession of sufficient information concerning the nature and extent of the "alleged infringement," but did admit purchasing systems from each of the above-listed corporations except Milgo Electronics Corp.

It is hornbook law that the claims of a patent set forth the formal definitions of the invention and must be looked to in determining if there has been infringement. *See Strumskis* v. *United States*, 200 Ct. Cl. 668, 474 F. 2d 623 (1973), *cert. denied*, 414 U.S. 1067. However, while a claim cannot be limited or expanded to give a patentee something other than what is claimed, courts are not confined to the language of the claims in interpreting their meanings. *Young* v. *United*

States, 204 Ct. Cl. 867, 179 USPQ 801, *cert. denied*, 419 U.S. 1002 (1974). Indeed, it is necessary, in construing the meaning of claims, to resort to the patent specification, its drawings and its file wrapper. *Autogiro Co.* v. *United States*, 181 Ct. Cl. 55, 384 F. 2d 391, 155 USPQ 697 (1967). At the same time, claim interpretation should be done on a reasoned basis to avoid unjust results. *Emery Industries, Inc.* v. *Schumann*, 111 F. 2d 209, 45 USPQ 12 (7th Cir. 1940).

With these guidelines and teachings in mind, we now consider whether plaintiff has shown an infringement of any of the claims at bar. Initially, it is important to point out that the parties have stipulated that drawing X500C, which accompanies finding 49, is representative of the problem check systems incorporated in the accused computers supplied to the Government. Defendant argues that the claims do not read on the accused representative system because:

(1) they should be interpreted to cover devices which read the signals at the output of the integrator;
(2) the accused system does not disconnect the output of the integrator's operational amplifier from the rest of the closed loop as taught by the McCoy patent;
(3) the accused system disconnects the summing junction of the integrator from the input of the integrator amplifier during problem check; and
(4) the accused system uses a separate operational amplifier to measure the summing junction current during the test mode.

A number of these arguments have directly or inferentially been touched upon in dealing with defendant's file wrapper estoppel arguments. As discussed in considerable detail in findings 72 through 88, it is concluded that all of the elements of claims 7, 8 and 13 both literally and substantively are found in the representative accused system as shown by drawing X500C. Accordingly, the accused system is found to infringe claims 7, 8 and 13. However, the claims are not found to cover open-loop sections of a computer setup (*i.e.*, loops open during the computational mode of the computer). Moreover, the claims are not found to cover second and higher-order loops of computer setups where there is no shunt path around the additional inte-

grators which would enable the test voltages to return to the integrator input.

License Defenses

In addition to the defense of noninfringement, defendant also contends, under a series of related theories, that it has a royalty-free license under the McCoy problem check patent. Attention is now directed to defendant's contention of being licensed under the patent in suit as a result of the background patent rights clause of contract No. Nonr–378(01), later renumbered contract NOas 52–1142–c.

By way of background, the parties to this lawsuit entered into a series of contracts beginning at least as early as 1946, for analog computer-related projects. Specifically, on June 10, 1946, the Department of the Navy awarded Reeves Instrument Co. (hereinafter referred to as "Reeves" or "plaintiff") contract No. N60ori–128. This contract consisted of Task Orders I and II. Task Order I covered the development of a guided missile simulator and the operation of a simulation laboratory in which research and development on guided missile simulation was to be carried on. Task Order II called for the development and construction of a rapid and precise automatic analog computer suitable for detailed simulation of guided missiles. The development of this simulator was based on available computing devices and techniques used in fire control equipment.

Task Order II included the construction of prototype simulators capable of solving guided missile equations and a complete guided missile simulator. The guided missile simulator was to be capable of solving equations describing in detail the space trajectory and behavior of any missile under any type of control, while taking into account the motion of a target and the motion of a control point.

On June 12, 1947, Task Order III was added to contract N6ori-128 for the purpose of providing the Navy with a simulation laboratory, the Project Cyclone Laboratory, which was to be operated by the Reeves Analysis and Computer Group. To this end, the laboratory was to conduct guided missile simulator research and evolve techniques and methods for solving practical guided missile problems.

The development and construction of the prototype simulation equipment were completed in early 1947. The guided missile simulator of Task Order II was completed in early 1949. With the satisfactory demonstration in February 1949 of the guided missile simulator solving a three-dimensional guided missile problem, Task Order II was substantially completed. Additional developments and modifications to the guided missile simulator after February 1949 were done under Task Order III.

In 1949, a new computing laboratory of REACs (an acronym for Reeves Electronic Analog Computer) was added to Project Cyclone under Task Order III. In addition, the older existing REACs, which were built in 1947, were modified to provide continuous automatic chopper balancing.

By 1951, the Navy had decided to modernize Project Cyclone by replacing the large, permanently connected ballistic computer with a laboratory consisting of REACs. The new REACs were procured under a separate Office of Naval Research contract No. Nonr-378(00)—Nonr-378(01). The parties have stipulated that the equipment was delivered, installed and accepted by the Navy by the end of 1952. With the transfer of cognizance of Project Cyclone on June 1, 1952, from the Office of Naval Research to the Bureau of Aeronautics of the Navy Department, Task Order III of contract N6ori-128 was renumbered NOas 52-1141-c, and contract Nonr-378(00)—Nonr-378(01) was renumbered NOas 52-1142-c.

Reeves was awarded contract NOas 53-383-c by the Bureau of Aeronautics for the continued operation of Project Cyclone in 1953. Also during 1953, an ELECOM 100 digital computer was added to the Project Cyclone Laboratory to perform check solutions for analog computations. In 1953, the Project Cyclone Laboratory consisted of three main laboratories. Laboratory 1 was equipped with new REACs funded under contract NOas 52-1142-c. Laboratory 2, which was set up to conduct test simulation, housed the original 1947 REAC. Laboratory 3 contained the ELECOM 100 digital computer and the REACs added in 1949.

In 1954, Reeves was awarded contract NOas 54-545-c by the Bureau of Aeronautics for the continued operation of

Project Cyclone. By letter of October 11, 1954, in reference to contract NOas 54–545–c, Reeves proposed to convert Laboratory 3 to prepatch, a removable plugboard arrangement. The proposal was approved by the Bureau of Aeronautics in a November 16, 1954, letter.

By letter of April 29, 1955, Reeves proposed to incorporate the problem check invention covered by the patent in suit in the Laboratory 3 computers at the same time that it was making the pre-patch installation. In addition, at the Navy's request, Reeves, on December 29, 1954, submitted a proposal for new equipment for Project Cyclone. Reeves' proposal included an enclosure, entitled "Specifications on Equipment," which was the preliminary specification for the new REAC C–400 computer and included a description of problem check. The problem check description was accompanied by a notation, "Patent Applied For." As of December 29, 1954, steps had been taken by Reeves to initiate the filing of a patent application on the McCoy problem check invention, but it had not actually filed an application in the Patent Office.

As a result of the December 29, 1954, proposal, as well as further negotiations between the parties, the Navy awarded Reeves supply contract NOas 55–603–f in 1955 for delivery of a REAC C–400 computer. By agreement of the parties, that contract did not contain a patent rights clause.

In 1955, Reeves was awarded contract NOas 55–571–c for the continued operation of Project Cyclone.

By March 1956, the patented problem check static test modifications had been made to the Laboratory 3 equipment of Project Cyclone under contract NOas 55–571–c. However, while the static problem check modifications had been installed by March 1956, the parties have stipulated that it was not necessarily operating as of that time.

Contract NOas 56–1089–c, which called for the continued operation of Project Cyclone, was awarded to Reeves in 1956.

During 1957, the oldest computer in Project Cyclone, dating back to 1947, which was housed in Laboratory 2, was replaced by a REAC C–400 computer. The computer was delivered under contract NOas 55–603–f, however, operation of the laboratory was done pursuant to contract NOas 56–1089–c.

Project Cyclone continued to be operated under Department of Navy contracts NOas 59–6215–c, NOw 60–0339–c and NOw 62–0149–c until 1962, at which time Government sponsorship of the project ceased.

Defendant has no Rights under the Terms of Navy Contract NOas 52–1142–c

The portion of the 1951 Navy contract NOas 52–1142–c, hereinafter sometimes referred to as "1142–c," which defendant introduced into evidence, contains the following Section H "Background Patent Rights Clause": [2]

> SECTION H * * *
> In addition to the rights granted to the Government in Section 29 of the contract, the Contractor hereby grants to the Government, under any patents now or hereafter issued with respect to which the Contractor now has, or prior to completion or final settlement of the contract may acquire, the right to grant licenses without becoming liable to pay compensation to others because of such

[2] In addition to the various other reasons for concluding that the Government is not licensed under the 1142–c contract, the ASPR instruction clauses which accompanied Section H (ASPR Clause 9–107.3) show that the clause was intended to provide the Government with reproduction rights to background patents and not to subsequently made improvement patents:

"9–107.3. *Reproduction Rights under Background Patents.* The grant of a license or title to the Government under foreground patents, as hereinabove in this part set forth, does not give the Government a free right to practice such foreground patents if the contractor owns or has control of a dominant background patent. It is therefore proper and desirable in the case of certain research or development contracts that the Government should obtain, under certain equitable circumstances as hereinafter set forth, a reproduction right (a limited license right) under such background patent or patents in addition to title or license under foreground patents as provided in paragraphs 9–107.1 and 9–107.2 above. Thus, reproduction rights should be obtained where there are benefits to the contractor, such as those set forth below, and where it is believed that the manufacture or use of the subject matter of the contract, or parts, modifications or improvements thereof, will involve the practice of inventions covered by contractor's background patents. The contract price should not be increased by reason of the acquisition of such reproduction rights."

* * * * *

Moreover, ¶9–101.4 of the ASPR defines background patent in the following manner:

"9–101.4. *Background Patent.* The term 'background patent' means a patent, other than a foreground patent, based upon inventions which relate specifically to the manufacture, construction, or use of the subject matter of the contract and under which the contractor has acquired, or prior to completion or final settlement of the contract may acquire, the right to grant a license without obligation to pay compensation to others solely on account of such grant."

grant, the right to reproduce or to have reproduced articles or materials substantially the same as those delivered to the Government hereunder, and any modifications, or improvements thereof, and to practice or cause to be practiced processes developed in the performance of this contract, and to use in their entirety and dispose of in accordance with law articles or materials so reproduced.

The 1142–c contract, nominally designated as a research and development task order, called for the delivery of certain equipment, including a number of REAC C–101 computers, in order to modernize Laboratory 1 of Project Cyclone. The C–101 REACs were intended to replace the large permanently connected ballistic computers then in use. The C–101 REACs called for were substantially identical to the line of commercially marketed Reeves' computers, except that they did not have pre-patch capabilities.

Defendant does not urge that the McCoy invention was made under the 1142–c contract. Indeed, the problem check invention was never even installed on any of the REACs delivered to the Government under the 1142–c contract. Rather, defendant attempts to argue that the problem check invention of McCoy represents an "improvement" within the meaning of Section H, and that defendant should, accordingly, be granted a license under the McCoy patent. Thus, defendant first points to the work provisions contained in the February 1, 1953, contract NOas 53–383–c and the April 30, 1954, contract NOas 54–545–c, *see* findings 114 to 117, as evidence of the interest by the Government to insure the validity of the solutions obtained from the REACs used in Project Cyclone. Building on that premise, defendant next contends that the 1142–c contract was not terminated until midnight of June 30, 1955. Finally, defendant notes that the McCoy patent was filed in the Patent Office on April 20, 1955.

On the basis of the above, defendant argues that the McCoy invention is an improvement which was made before the alleged June 30, 1955, termination date of the 1142-c contract and thus comes within the terms of the Section H provision.

Defendant's argument fails for a number of reasons. In the first place, defendant has failed to provide the court with a complete copy of the 1142-c contract. It should be recalled that originally that contract was designated as Nonr-378 (00)—Nonr-378(01). The 378(00) portion allegedly contained the basic terms of the agreement, while the 378(01) portion was a task order. Defendant has failed to submit any of the 378(00) section of the contract. Defendant shrugs off the absence of that portion of the contract on the grounds that it only intends to rely on the 378(01) task order. However, not only was the 378(01) task order introduced into evidence incomplete, but the record shows that the record copy has been constructed from at least two different sources. Plaintiff thus argues that:

> In view of this state of affairs and the fact that provisions found in one section of a Government contract are frequently amended or even deleted by language in other sections * * *, there is clearly no rational basis for determining just what provisions existed in the actual contract.

A review of relevant authorities indicates that complete contracts do not have to be introduced into the record in all circumstances.[3] However, the cases in which incomplete contracts have been introduced and relied on have required supplemental testimony to show that the missing portions were insignificant and/or had no impact on the issues at bar.[4] In the instant case, no testimony has been received to show that later amendments did not modify the Section H clause upon which the Government here relies.

However, defendant's arguments concerning its reproduction right under the McCoy patent on the basis of Section H fail for another reason. Specifically, Section H, in pertinent part, provides that the contractor grant—

> * * * to the Government, under any patents now or hereafter issued with respect to which the Contractor

[3] "* * * the * * * destruction of the instrument generally has merely the effect of a loss of primary evidence which may be remedied in an action at law by the use of secondary evidence."

13 WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, § 1599 (3rd ed. H. E. Jaeger 1970); *cf.* 7 WIGMORE, EVIDENCE, § 2105 (3rd ed. 1940).

[4] The opportunity was given to defendant during trial to bring forth any other evidence or testimony to establish the totality of the contract, but defendant did not avail itself of that opportunity.

> now has, or prior to completion or final settlement of the contract may acquire, * * * the right to reproduce or to have reproduced articles or materials substantially the same as those delivered to the Government hereunder, and any modifications, or improvements thereof, * * *.[5]

The basis for the Government's assertion that the 1142–c contract was not completed until June 30, 1955, appears to be a June 21, 1955, form letter of inquiry that was required by the Department of Defense's Appropriation Act of 1955. That letter points out that the inquiry was made because the 1142–c contract had not been certified for continuance beyond June 30, 1955, and that the Appropriation Act required termination as of that date for all contracts financed under certain annual appropriations. A reading of the June 21, 1955, letter, and particularly the following language, indicates that the letter was merely a form letter which cannot be taken to establish that the 1142–c contract was terminated on June 30, 1955:

> Accordingly, you are hereby notified that to the extent of the items and/or lots under Contract NOa(s) 52–1142–c * * * *such items and/or lots not completed as of midnight 30 June 1955 are hereby terminated as of such date* * * *. [Emphasis added.]

This language clearly shows that the purpose of the letter was to generally deal with uncertified contracts that would not be completed before June 30, 1955, or had not been previously completed. It certainly does not preclude the possibility that the 1142–c contract had been completed prior to the June 30, 1955, date.

Moreover, if the 1142–c contract had been terminated by the June 21, 1955, letter, plaintiff would have submitted certain contract related information required by that letter. Specifically, the letter required:

> You are requested to notify the Contracting Officer in detail as promptly as practicable after 30 June 1955 of the status of performance of items and/or lots af-

[5] Plaintiff also argues that it did not have any rights under the McCoy patent to grant to the Government prior to completion of the contract because that patent did not issue until 1961 and this was long after even the June 30, 1955, completion date urged by defendant.

> fected by this termination, including information setting forth the extent of completion and an estimate of the termination claim, if any.

There has been no showing that plaintiff made a claim as a result of the "termination," nor has defendant introduced any of the detailed information requested in the event that the June 21, 1955, letter had served to terminate the 1142–c contract.

To the contrary, the trial record indicates that plaintiff completed the 1142–c contract long prior to the June 30, 1955, date urged by defendant, and probably by late 1952. This is not only shown by the testimony of record, *see* finding 110, but also by a stipulation entered into by the parties. That stipulation provides:

> 6. In 1951, it was decided to modernize the operation of Project Cyclone by replacing the large, permanently connected ballistic computer with a laboratory consisting of REACs. This new equipment was procured under a separate contract Nonr–378(00), Nonr–378(01) awarded to Reeves Instrument Corporation by the Office of Naval Research. The equipment was delivered, installed and accepted by the end of 1952.

The record thus establishes that the McCoy patent filing date of April 20, 1955, is long after the completion date of the 1142–c contract. Accordingly, even assuming that the Section H background patent rights clause was to be applied to a situation such as the one at bar, it is concluded that the plaintiff did not have, prior to completion or final settlement of the 1142–c contract, any rights under the McCoy patent. Thus, defendant is not entitled to any reproduction rights under the McCoy patent.

Defendant is not Licensed Under the McCoy Patent as a Result of Terms of Navy Contract NOas 54–545–c

Defendant next argues that it has an express license to practice the inventions disclosed and claimed in the McCoy patent by virtue of the terms of the patent rights clause contained in its 1954 Navy contract NOas 54–545–c, hereinafter referred to as "545–c," with plaintiff. As previously explained, the 1954 contract was one of a series between the

parties which continued the operation of the Project Cyclone facilities. Defendant couples the work statement and the subject invention clauses of the 545–c contract with the argument that McCoy is a "Technical Personnel" as defined by that contract, to urge the conclusion that it is licensed under the patent in suit. Defendant leans heavily on the decisions of this court in the cases of *Mine Safety Appliances Co.* v. *United States*, 176 Ct. Cl. 777, 364 F. 2d 385 (1966), and *Technitrol, Inc.* v. *United States*, 194 Ct. Cl. 596, 440 F. 2d 1362 (1971), for legal support. However, as will become apparent, the facts of the case at bar dictate against reaching a similar result.

While defendant points out that in some instances the work to be done under the contract was designated as research and developmental, a comparison of the 545–c work statement with the work statements of predecessor Project Cyclone contracts illustrates that important changes had occurred between the granting of the 1946 Project Cyclone contract and the 1954 contract in question. Furthermore, in order to appreciate defendant's argument, it is necessary to reemphasize the importance to analog computer users in having some assurance of the accuracy and validity of the results obtained. This problem was a recurring one that had plagued analog computer users from at least as early as 1946, the inception date of Project Cyclone.

This consideration was equally important to Project Cyclone, since, as established from a review of the various contracts involved in this case, as well as the proof of record, it is concluded that its main purpose was to enable defendant to avail itself of plaintiff's expertise in solving complex problems through the use of simulation equipment. It thus comes as no surprise that concern for the validity of the results obtained should find its way into some of the early contracts between the parties. Looking first to Section A of the Task Order III portion of N6ori–128, plaintiff was required to "* * * take all necessary steps to insure the validity of computer results." By 1949, that clause [6] was expanded to read as follows:

[6] Section A(d)(v) of Amendment No. 6 to Task Order III of February 10, 1949.

(v) *Validity of Results.* The Contractor shall take necessary steps to insure the validity of conclusions reached by application of the Simulator to research problems. *The Contractor shall conduct research to evolve the most efficient methods of checking research problems* and will apply such methods as adequately as possible to all research work conducted by the Contractor. The results of such checking procedures shall be reported by the Contractor in the Post Analysis report on each research problem. [Emphasis added.]

In accordance with that mandate, plaintiff hired Professor F. J. Murray as a private consultant to assist the Project Cyclone personnel in conducting an intensive investigation into error analysis techniques.[7] In addition, an investigation was made to determine if digital computers could be used to provide independent digital solutions to the assigned problems. As a result, plaintiff recommended that the Navy purchase a digital computer for use in checking the solution to simulator problems.[8] The recommendation was followed[9] and in 1952 an ELECOM–100 digital computer was procured from the Underwood Corporation under Navy contract NOas 52–869–f.

[7] Defendant does not contend, nor does the record indicate that Rawley D. McCoy participated in any of the research and development work carried out by Project Cyclone pursuant to Clause v of the 1949 contract.

[8] *See* letter from Commanding Officer and Director to Chief, Bureau of Aeronautics, dated September 4, 1951, which states in pertinent part:

"1. For the past several years, it has become increasingly apparent that large scale analogue simulators must be provided with an adequate means for checking the correctness of programming and the accuracy of solution for practical design and test problems. This Center has conducted a series of theoretical analyses, practical investigations, and surveys to determine: (1) the need for checking facilities; (2) the type of facilities needed; and (3) the availability of such facilities. Mathematicians and engineers of this Center and of the Cyclone Simulation Laboratory, together with the Center's consultant, Professor F. J. Murray, of Columbia University, have jointly investigated the problem. In accordance with the discussions of reference (a), the resulting recommendations by this Center are:

"a. That the Cyclone Laboratory should be provided with a small scale digital computer of moderate complexity, speed, and cost."

[9] The September 25, 1951, letter from the Chief of the Bureau of Aeronautics to the Director of Special Devices Center states:

"1. The recommendations of paragraph 1 of reference (a) that a small scale digital checking computer of moderate complexity, speed, and cost be ordered as soon as possible for the Cyclone Laboratory have been noted.

"2. The Bureau of Aeronautics concurs with these recommendations. Unfortunately, no funds have been provided for this procurement. However, the recommendations of reference (a) will be reconsidered at such time as funds become available."

While both the 1953 contract, NOas 53–383–c, as well as the 545–c contract continued to set forth the requirement that plaintiff "take necessary steps to insure the validity of the solution to simulator problems," those contracts no longer authorized any research into problem checking. The testimony of record is compatible with the above analysis and is totally devoid of any post-1952 showing that either the Navy or plaintiff was concerned with the development of new techniques for the checking of problems on Project Cyclone.[10]

The use of the ELECOM–100 computer at Project Cyclone is the only reasonable explanation for the absence of provisions calling for research into the checking of analog computer solutions in both the 1953 and 1954 contracts. Indeed, the record makes it abundantly clear that the ELECOM–100 was successfully used for that purpose and found to be ideally suited for the task of supplying independent check solutions prior to the running of problems on the analog computer. The undisputed testimony establishes that Project Cyclone personnel believed that the ELECOM–100 was providing the best available checking techniques to insure the validity of the analog computer solutions.

The above analysis clearly highlights that the parties had completed research to their mutual satisfaction in the area of problem checking well before the NOas 54–545–c contract was entered into.

Ignoring all of the above dealings between the Navy and plaintiff, defendant argues that the Section C, Item 1(e), provision, which required plaintiff to take necessary steps to insure the validity of the solutions to simulator problems, along with the following Section C, Item 3, requirement, establishes that the invention covered by the McCoy problem check patent comes within the research work called for by the 545–c contract:

[10] Mr. McCoy's testimony on this point is particularly enlightening for it shows that after Project Cyclone became fully operational and certainly following its modernization in 1952, that he regarded it as a fairly completely developed facility. He was unable to recall any requests from Project Cyclone for help in the checking of problems. On this point, he testified:

"I do not recall any incident after that time [1952] in which it was stated or suggested to me that the facility was having problems with checking. In fact, it was my understanding that Project Cyclone with its facilities and its ELECOM computer, had satisfactory means for dealing with this problem."

> Item 3. The Contractor shall make necessary modifications and improvements to existing equipment and shall develop, construct and furnish hereunder such additional equipment as may be needed to efficiently solve assigned problems; *provided, however*, that the contractor obtains authorization from the Bureau of Aeronautics in writing prior to the development, modification or construction of equipment hereunder.

A review of findings of fact 113 to 118 makes clear that the Section C, Item 3, and Section A, Item 1(e), provisions, and their counterparts in prior contracts, were from the inception of Project Cyclone intended to cover auxilliary simulation equipment, such as plotting boards, function generators, output tables, etc., needed to efficiently solve assigned problems. That those provisions were not intended to authorize work in the area of problem check is clear from the fact that plaintiff had at least as early as 1952 completed research on problem checking under another contract provision.[11]

Moreover, the Section C, Item 3, provision of the 1954 contract did not authorize plaintiff to make any modifications or improvements to existing equipment unless it had obtained "* * * authorization from the Bureau of Aeronautics in writing prior to development, modification or construction of the equipment hereunder." While defendant urges that the McCoy invention was made under the above provisions, no evidence is offered to show that any authorization by the Bureau of Aeronautics was given to plaintiff to conduct research and/or development leading up to the invention involved in this suit.

In view of the above, it is concluded that the 1954 contract did not contemplate nor require any research and development work in the field of problem check.

We next consider the patent rights clause, Article 36, of the 545–c contract, which provides in pertinent part:

> (a) As used in this clause, the following terms shall have the meanings set forth below:
> (i) The term "Subject Invention" means any invention, improvement or discovery (whether or not patentable) conceived or first actually reduced to practice

[11] Section A(d)(v), Amendment 6, to Task Order III.

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either (A) in the performance of the experimental, developmental or research work called for under this contract, or (B) in the performance of any experimental, developmental or research work relating to the subject matter of this contract which was done upon the understanding that a contract would be awarded.

(ii) The term "Technical Personnel" means any person employed by or working under contract with the Contractor (other than a subcontractor whose responsibilities with respect to rights accruing to the Government in inventions arising under subcontracts are set forth in paragraphs (f), (g), and (h) of this clause), provided that such person, by reason of the nature of his duties in connection with the performance of this contract, would reasonably be expected to make inventions.

* * * * *

(b) The Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, nontransferrable, and royalty-free license to practice, and cause to be practiced for the Government throughout the world, each Subject Invention in the manufacture, use, and disposition according to law, of any article or material, and in the use of any method; *provided, however*, that with respect to (i) any Subject Invention made by other than Technical Personnel, (ii) any Subject Invention conceived prior to any performance of this contract as set forth in paragraph (a) above but first actually reduced to practice in the course of any such performance, and (iii) the practice of any Subject Invention in foreign countries, the said license and other rights hereinafter provided shall be to the extent of the Contractor's right to grant the same without incurring any obligation to pay royalties or other compensation to others solely on account of said grant. Nothing contained in this paragraph shall be deemed to grant any license under any invention other than a Subject Invention. Any license granted herein shall not convey any right to the Government to manufacture, have manufactured, or use any Subject Invention for the purpose of providing services or supplies to the general public in competition with the Contractor or the Contractor's commercial licensees in the licensed fields.

Having concluded that research work in the area of problem check was not called for by the 1954 contract, it is enough to dispose of defendant's license argument by pointing out that defendant has failed to show that the McCoy invention

was "* * * conceived or first actually reduced to practice * * * in the performance of the experimental, developmental or research work called for under this contract * * *. Thus, defendant has not shown that the McCoy invention was a subject invention within the meaning of the contract.[12] However, it is not necessary to rest this decision on that basis alone, for defendant's contention fails for the equally important reason that it has done nothing more than broadly allude to various "connections" or "contacts" between McCoy and/or his invention on the one hand, and the 545–c contract on the other. As will be shown, defendant supplies no hard facts to support its suspicions.

Defendant's arguments concerning the relevancy of cases such as *Mine Safety* and *Technitrol* to the facts of this case are not convincing. As understood and simply stated, defendant's position appears to be that it is entitled to a license under any invention conceived or reduced to practice by a Government contractor if the invention in any way relates to the subject matter of the parties' contract. This court has made clear that the license rights clause in Government contracts will not be restricted to situations where every component of the invention has been discovered in the course of contract performance. The attitude of this court on that point is summarized in the following statement from *Technitrol*, *supra*, p. 619:

> What *Mine Safety* teaches is that the issue of license *vel non* should be approached liberally by asking what the United States (acting for its taxpayers) can fairly be said to have purchased through its sponsorship of the contract project. The Federal Government has the right to use, royalty-free, those ideas, improvements, discoveries and inventions—crystallized during a performance of the federal contract—which have a "close and umbilical relationship" to the work and research funded by the United States. Having borne the expense of that effort, the public is entitled to enjoy the fruits without further charge. Accordingly, as we said in *Mine Safety*, "[i]t is fitting to read the license-grant of Section 17 * * * liberally * * * and not to confine it severely within a narrow compass."

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[12] *See Mine Safety Appliances Co. v. United States*, 176 Ct. Cl. 777, 364 F. 2d 385 (1966).

In arguing that it should receive a license under the invention disclosed and claimed by the McCoy patent, defendant points out:

> 1. That defendant was funding an on-going project that had begun some 8 years prior to the conception of the McCoy problem check invention;
> 2. That the incorporation of the invention into Laboratory 3 under the 1954 contract and its succeeding contracts goes far to show that the invention had a "close and umbilical relationship" as a whole with the Government-financed Project Cyclone; and
> 3. That McCoy was a "technical personnel" as defined by the 545–c contract and as such was an inventor or co-inventor of three patents under various Project Cyclone contracts, including the 545–c contract.

With regard to defendant's initial point, it has already been shown that the 1954 contract did not contemplate nor authorize research by plaintiff into the problem check area.

The fact that problem check was incorporated into Laboratory 3 under the 1954 contract is readily explained from the trial record. An April 29, 1955, letter from Mr. Bauer, plaintiff's director of Project Cyclone, to the Chief of the Bureau of Aeronautics, indicates that the McCoy invention was brought to defendant's attention by plaintiff and plaintiff volunteered to upgrade the Project Cyclone equipment at no cost to defendant. Specifically, the letter states in pertinent part:

> 3. Reeves has developed "Problem Check", a new way of checking problem set-ups, which promises to be particularly useful when applied at a large prepatch installation.
> 4. Since Laboratory No. 3 will be modified to prepatch it will be advantageous to use this opportunity to incorporate "Problem Check" especially since the down-time will not be appreciably increased thereby.
> 5. The cost estimates in paragraph (2) will not be affected because of the addition of "Problem Check". We will therefore incorporate "Problem Check" with the prepatch installation.

It thus is clear that the incorporation of problem check into the Laboratory 3 computers was done at no cost to defendant.

A number of fundamental facts which persuaded this court to conclude that a close and umbilical connection existed between the invention covered by the patent in suit and the contract in the *Mine Safety* case, *supra*, are not present in this instance. In *Mine Safety*, one of the co-patentees, Dr. Clarles F. Lombard, was assigned to work full-time on a Government-sponsored contract and his salary came almost entirely from Navy funds. Neither of these elements have been shown to be true in the case of Rawley McCoy.

Other factors, none of which have been shown by defendant to be present in this case, which played a significant role in shaping the results reached in *Mine Safety*, include:

(1) USC's (the contractor) acquiescence that the research relating to the development of the crash helmet (the invention at issue in that case) was covered by its Navy contract;
(2) The fact that both the Navy and USC anticipated and foresaw that protective gear would result from the knowledge gained from the contract; and
(3) The fact that work on the patented crash helmet was carried out by the co-patentees in close physical proximity (cheek-by jowl) to the work under the Navy contract.

Moreover, the fact that the co-patentees in *Mine Safety* would not have been able to make their invention but for the knowledge they gained from their work under the Navy contract also appears to have played an important part in the *Mine Safety* case.

In this case, the inventor, Rawley D. McCoy,[13] had a varied and impressive background prior to his employment by plaintiff in 1946. Mr. McCoy received a master's degree in engineering in 1937, and came to plaintiff as a senior engineer after serving five years at Sperry Gyroscope Co. While at Sperry, he gained extensive experience in servo-mechanisms, radar and gun control systems. Mr. McCoy was hired by plaintiff to work on a new fire control system. McCoy also participated in the development and construction of the first simulator equipment used on Project Cyclone.

After these initial assignments, McCoy experienced a dramatic rise through Reeves Corp.'s hierarchy.

[13] For his contributions to the field of analog computers and servo-mechanisms, Mr. McCoy was elected a fellow of the IEEE.

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In about 1950, McCoy was made a member of an engineering committee which supervised the engineering activities of plaintiff. A short time later, but still in 1950, he was appointed the chairman of the committee and assumed corporate as well as engineering duties. As a result of his corporate duties, he became involved in a wide variety of nontechnical time-consuming matters, such as labor disputes, hospitalization, union elections, etc. He also was responsible for supervising plaintiff's commercial REAC program.[14] Plaintiff, between the years 1948 and the early 1950's, was the leading commercial manufacturer of analog computers. The record undisputably establishes that McCoy, except for a brief one- or two-month period, occasioned by the unexpected resignation by the director of Project Cyclone in April 1952 which forced him to take charge of that project until a replacement was found, was not directly involved with Project Cyclone. As a result of McCoy's managerial duties, McCoy only exercised administrative functions with regard to Project Cyclone after 1950.

In explanation of defendant's argument that McCoy, individually or jointly, made inventions in 1953, 1954 and 1957 in connection with various Project Cyclone contracts, the record shows that these inventions were made as a result of his being consulted by personnel assigned to Project Cyclone.[15] In the three instances involved, and McCoy testified

[14] As will be developed in more detail in dealing with defendant's estoppel arguments, the evidence of record establishes that the problem check invention was conceived by McCoy in July 1954 when considering a response to the Department of the Air Force's request for suggestions in connection with the Wright-Patterson Air Development Center's analog computer, and, as well, when he was considering features to be added to plaintiff's new REAC C-400 line of computers. The record also shows that the problem check invention was reduced to practice by at least March 1955 by plaintiff's building of a REAC C-400 for the Farnsworth Co.

[15] Mr. McCoy testified with regard to these inventions as follows:

"Also on some occasions when Project Cyclone was assigned problems which they couldn't process because of lack of some special equipment, they would ask me how I thought about doing it. When they asked me, and if the problem was intriguing, I would think about it and try to work up a solution for them.

"For example, I recall three instances of learning of difficulties of Project Cyclone with solving certain problems and of offering advice. One involved the need for a function generator sometime around 1953.

"Another involved a requirement for electronic multipliers in the 1954 period.

"A third involved a need for a special time delay apparatus sometime in or about 1957.

"Throughout the entire '50s and thereafter, I was on the executive payroll and did not fill out any time cards. For this reason, and because Project Cyclone replied on such cards, I do not believe that any of my salary was charged to Project Cyclone during this period."

that there were only three instances in which he was approached for technical assistance with regard to Project Cyclone activities, plaintiff willingly reported the inventions to the Navy and defendant was granted a royalty-free license thereunder. It should be noted that the three patents all relate to auxiliary equipment for analog computers and, accordingly, would come under the modifications authorized by provisions of Project Cyclone contracts, such as Section C, Item 3, and Section A, Item 1(d), of the 545–c contract.

After becoming a vice-president in 1953, McCoy had overall responsibility over plaintiff's entire engineering division. Beginning in 1954, McCoy was engaged in the general administration of plaintiff's engineering department and, in addition to the typical managerial duties associated with such office, he had direct supervision of at least 14 technical programs. By mid-1954, plaintiff's engineering department included over 600 employees.

Of significance to this case is the fact that defendant cannot show that McCoy ever performed any duties in connection with the 1954 contract under which it claims a license right to his invention.[16] Moreover, defendant has not shown that any of McCoy's time was directly charged or his salary paid by any Project Cyclone contracts.

Also significant is the almost autonomous manner in which Project Cyclone operated. The independence of that project from plaintiff is evidenced by the fact that plaintiff's personnel assigned to that project communicated directly with the Navy for work assignments. In fact, Project Cyclone had its own director and staff who were directly responsible to the Navy for work to be done under any of the Navy contracts. Mr. Bauer, director of Project Cyclone from 1952 to 1961, reported to Mr. McCoy for purposes of salary and personnel coordination with plaintiff's engineering department only.

Accordingly, the facts which played such an important part in shaping this court's *Mine Safety* and *Technitrol* decisions are totally absent from the case at bar. To the contrary, the facts show that the McCoy invention was not conceived in the performance of the experimental, develop-

[16] Thus defendant has not shown that McCoy was a technical personnel within the meaning of Article 36(a)(ii) of the 1954 Navy contract.

mental, or research work called for by the 545–c contract. Defendant has also failed to show that McCoy was in any way involved in any of the work done by plaintiff under that contract. It, therefore, must be concluded that defendant is not licensed under the McCoy patent as a result of plaintiff's 1954 Navy contract.

No Estoppel Against Plaintiff

Defendant next contends that plaintiff is equitably estopped, by its false representations and concealment of material facts, from denying that defendant has an implied royalty-free license under the problem check patent in suit. A proper understanding of defendant's contention requires a brief consideration of the dealings between plaintiff and defendant's Departments of the Navy and Air Force during the late 1940's and early 1950's.

The Air Force began operating an analog computer facility at Wright-Patterson Air Development Center, hereinafter referred to as "WADC," in 1948. As a result of a 1951 study, the Air Force decided to materially increase the size of its WADC analog computer facility. For reasons which are unimportant to the issues at bar, the procurement responsibility for this facility was transferred to a Mr. L. M. Warshawsky in 1954. After a review of the project, Mr. Warshawsky felt it would be to WADC's best interest to seek the assistance of outside experts. As a result, on July 6, 1954, WADC wrote to various analog computer manufacturers, including plaintiff. The July 6, 1954, letter stated in pertinent part:

> 1. The Air Force is considering investigation of the problem presented herein and is desirous of obtaining preliminary data for planning purposes. Any information furnished in response to this request will be used for planning purposes only. It is not to be construed that procurement action will necessarily follow, nor does the submission of requested data obligate the Government in any way. You are cautioned that the advice given by your organization may be used in writing a specification for future procurement; and therefore, it is not desirable to have proprietary information included in your discussion, unless it is clearly indicated that you consider such information to be of a proprietary nature.
>
> * * * * *

7. * * *

d. Another consideration in a computer of the size envisioned is the problem of validity of solutions obtained. Such things as minimizing human and machine errors should be considered. Means of assuring the proper inter-connection of the elements of the computer such as by punched card programming or automatic verification of wired-up plugboards, should be investigated. Means of running fast check solutions should also receive attention.

In response to the letter, technical personnel from a number of commercial manufacturers, including Mr. Rawley D. McCoy, who was then a vice-president of Reeves, Mr. C. B. Dewey, also a vice-president of Reeves, and Dr. Louis Bauer, the director of Project Cyclone at Reeves, visited WADC on August 18 and September 8 of 1954. While the record is not clear as to what transpired at each of the meetings, it is not disputed that the plaintiff's representatives did make oral representations concerning the equipment and features that should be specified for the WADC computer facility. The oral recommendations for the proposed equipment included the problem check invention.

In addition, during at least one of the above two meetings, and possibly at both, written descriptions of the problem check invention were left with Mr. Warshawsky. The written material did not include any legends or notes that the problem check feature was the "proprietary information" of plaintiff. Nor did the written material contain any notification that a patent application on the problem check feature had been applied for.

Following the receipt of ideas from various manufacturers, and after obtaining approval to proceed with the procurement, WADC prepared a specification for the equipment desired. The specification, which was made a part of the January 13, 1955, request for proposal on Purchase Request 131, included a description of the problem check feature suggested by plaintiff. The paragraph of interest, 2.1.2.1.8, reads as follows:

As an overall check on the machine set up, scale factor settings and component functioning, a "Problem Check" mode of operation will be added to the normal Reset, Operate, Hold and Balance Check modes now in com-

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mon use in differential analyzers. In one suggested implementation of this new mode, all integrators will be converted into summers by paralleling their feedback capacitors with resistors. At the same time the integrator outputs will be disconnected from the "out" terminals on the plugboard which will be fed, instead, by an adjustable voltage source such as a potentiometer. In this way voltages may be introduced into the set up statically causing output voltages to appear at every component. The integrator voltages will be the initial values of the derivatives. By means of the automatic scanning and printing equipment all these voltages may be recorded and checked at the desk by substituting the initial values of the integrators into the equations representing the problem. It is apparent that this powerful check could be performed on existing computers, but it is equally apparent that the time and labor is considerable, as is the additional possibility of operator errors.

A purchase request, including the specification and a January 13, 1955, cover letter, was sent by the contracting officer, along with an invitation to bid thereon, to a number of computer manufacturers, including plaintiff's predecessor in interest, Reeves. Reeves did not protest the inclusion of the problem check description in the WADC specification. After evaluation of the responses from the various computer manufacturers, Reeves was ultimately awarded Air Force contract AF 33(616)-3097 on June 1, 1955.

Defendant, in addition, grounds its estoppel argument on alleged false statements made by plaintiff to the Navy during negotiation of a 1955 supply contract for REAC C-400 computers and auxiliary equipment for Project Cyclone. The trial record indicates that as a result of a request by the Bureau of Aeronautics of the Department of the Navy, plaintiff, on December 29, 1954, submitted a proposal for new equipment for Project Cyclone. Appended to plaintiff's proposal letter was an Enclosure B which described the specifications for the new commercial REAC C-400 series computer. The enclosure indicates that Reeves had applied for a patent on the problem check invention. Defendant argues that as a result of plaintiff's statement the parties negotiated to exclude the patent rights clause from the contract which ultimately issued, Navy contract NOas 55-603-f, and that the

clause would ordinarily have been "* * * included in the procurement of not yet fully developed equipment."

Defendant, on the basis of the above, argues that plaintiff is—

> * * * guilty of concealing material facts as to their claim of proprietary subject matter in their disclosure of "Problem Check" to the Air Force while at the same time misrepresenting the true facts to the Navy in alleging that a patent had been applied for when in fact no patent had been applied for.

Defendant thus urges that plaintiff is equitably estopped to deny that defendant has an implied royalty-free license under the McCoy patent. Defendant's arguments are not persuasive for a number of reasons, and in order to fully develop these reasons, it is necessary to briefly review Mr. McCoy's duties at Reeves during the period relevant to this lawsuit.

Following his employment in 1946, Mr. McCoy was assigned to assist in a number of projects, including the development of equipment for Project Cyclone. Starting in the late 1940's and especially after he had become a member of the engineering committee in October 1950, his duties included supervision of the Reeves commercial REAC analog computer program. The program involved the development and marketing of Reeves' general purpose REAC computers. Mr. McCoy's duties included the development of the very first commercial REACs, the C–101 series, during 1948 or 1949. The predecessors of the first commercial REACs were the d.c. computers of Project Cyclone. Between 1949 and 1954, Reeves developed the C–200, C–300 and C–400 series of REACs. Mr. McCoy has testified, and no evidence has been introduced into the record to dispute his testimony, that all engineering expenses incurred in the development of the REAC models after the C–101 series were borne exclusively by Reeves.

In early 1954, Mr. McCoy became concerned with Reeves' commercial REAC program. Reeves had been the leading manufacturer of commercial analog computers for the period from 1948 through the early 1950's. However, by 1954, competitors had made drastic inroads into Reeves' sales and its sales were in a serious decline. Therefore, in the first half of

1954, Mr. McCoy, in the hopes of revitalizing Reeves' sagging commercial market, initiated a program to develop a new line of computers. This new line eventually became known as the C–400 series.

In the summer of 1954, Mr. McCoy also learned of WADC's request for proposals for a large general purpose analog computer facility. In July of 1954, while working on Reeves' proposal, Mr. McCoy conceived the problem check invention. A written description of the invention was initially prepared at Mr. McCoy's request by Mr. Bernard Loveman on August 16, 1954. Mr. Loveman had transferred from Project Cyclone to Reeves' sales department in the summer of 1954 and was assigned to the marketing effort being carried out for the new REAC C–400 computers. Mr. Loveman testified that he learned of the problem check invention for the first time in 1954 from Rawley McCoy. Mr. Loveman further testified that the description was prepared by him for use in his marketing efforts for the new C–400 computer.

Mr. McCoy also disclosed his invention to Mr. Dewey and Dr. Bauer, the remainder of plaintiff's team who were slated to accompany him to WADC on August 18, 1954.

In addition to the one prepared by Mr. Loveman on August 16, 1954, written descriptions of the invention were prepared by Dr. Bauer, and, as well, by Mr. McCoy on September 2 and September 7, 1954. Mr. McCoy's September 2, 1954, description was to be used in a proposal to the Fort Worth Division of Convair. The September 7, 1954, description was written by Mr. McCoy in anticipation of a second meeting with Mr. Warshawsky at WADC on September 8, 1954.

As previously mentioned, plaintiff was concurrently preparing for the production of the C–400 series of computers. However, plaintiff's president required a firm order for at least one C–400 series computer before he would authorize the expenditure of funds to procure parts, materials and assign drafting and engineering labor to the project. As a result of Mr. Loveman's efforts, an order for the first C–400 series computer was obtained in November 1954 from the Farnsworth Co.

Construction of the machine began in December 1954, although it appears that a preliminary specification and a number of the components for the machine had been engineered before November 1954. The Farnsworth REAC C–400 was essentially completed in time to be shown at the March 1955 IRE show in New York. Mr. Loveman testified that he demonstrated the computer at the show and that the computer included both static and dynamic problem check circuits. He further testified that he used the static problem check feature of the computer to authenticate the programming of a simple problem at the IRE show.

With the above historical perspective, we now consider that phase of defendant's estoppel defense that is grounded on a concealment of facts for the Air Force. In order to work an estoppel on plaintiff, defendant must establish four necessary elements, *see United States* v. *Georgia-Pacific Co.*, 421 F. 2d 92, 96 (9th Cir. 1970):

> Four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

In this case, defendant has not shown that plaintiff intended to mislead defendant by failing to designate the problem check feature as its proprietary information or to inform it of plaintiff's intention to obtain a patent on the problem check invention. Moreover, plaintiff did not act in a manner which would reasonably lead defendant to believe that plaintiff did not intend to obtain patent coverage for the problem check invention. To support its position, defendant relies heavily upon the July 6, 1954, Warshawsky letter which cautioned that all proprietary information be clearly indicated because of WADC's possible use of the information in the writing of a specification for future procurement.

Defendant stresses that at no time during any of the discussions between Reeves' representatives and Mr. Warshawsky, nor in any of the written material left with Mr. Warshawsky, did plaintiff indicate that it had a proprietary interest in the feature known as "problem check."

Clearly impressed by plaintiff's problem check feature, Mr. Warshawsky incorporated it into the work specification of the January 13, 1955, request for proposals of purchase request No. 131, which was sent to the major analog computer manufacturers of that time. In explaining his action, Mr. Warshawsky testified:

> I felt free to incorporate this feature in the specifications because it was my clear recollection that there was no mention made by Reeves' personnel of a pending patent application nor was there any restrictions placed on my using the idea in our specifications if I saw fit to do so.

Contrary to defendant's version of plaintiff's submission, Mr. McCoy testified that the disclosure to Mr. Warshawsky was done in a manner to emphasize that the idea originated with and belonged to Reeves. The difference between plaintiff's and defendant's versions may find its source in the language used in Mr. Warshawsky's July 6, 1954, letter. The letter cautioned against the inclusion of "proprietary information," a term of art in the intellectual property field. The term was used in 1951, as well as today, to mean information which originates with or is peculiarily within the knowledge of its owner, or those in privy with him, that is not available to the public and is protectable as a trade secret property right.[17]

Section 9–210(c) of the April 9, 1957, Armed Services Procurement Regulations, defined "proprietary data" as—

> * * * information concerning the details of the contractor's trade secrets or manufacturing processes which are not disclosed by the design itself in which the contractor has the right to protect the use by others.

The facts of record establish that McCoy had only conceived his invention in July of 1954, his reduction to practice not having occurred until sometime thereafter. Thus, serious doubt exists as to whether Reeves had a protectable "property right" at that point in time, for it is not at all certain when the "idea" was reduced to concrete form sufficient to enable plaintiff to call it "proprietary data." *Belt* v. *Hamilton Nat.*

[17] *See* Sec. 517 of the Mutual Security Act of 1951 (Pub. L. 165, 82d Cong.); *see also* RESTATEMENT OF TORTS, Vol. IV, Sec. 757 (1939); *Kewannee* v. *Bicron*, 416 U.S. 470 (1974).

Bank, 108 F. Supp. 689, 95 USPQ 311 (D.C. 1952), *aff'd*, 210 F. 2d 706 (D.C. Cir. 1953). Courts are reluctant to elevate an untested idea to the status of a property right without some proof that the physical means for putting it to use exists. Sec. 2.02[1] MILGRIM, TRADE SECRET (1974).

In addition, since one of the requisites of a trade secret is that the possessor take reasonable measures to protect its secrecy, it seems highly unlikely that plaintiff could have made a decision and set up the necessary internal program to maintain the feature as its proprietary information between the time of McCoy's conception and the WADC disclosures.[18] In any event, the facts of record fail to show that plaintiff viewed the problem check feature as its properietary information at the time of the August and September 1954 discussions and written submissions to defendant.

Indeed, the record does not indicate even as late as March of 1955, at which time plaintiff submitted its response to the January 13, 1955, WADC request for proposals, that plaintiff had set up an internal program to protect the problem check feature as its proprietary information. This is substantiated by Mr. McCoy who testified that he was aware that his discussions and disclosures to WADC could forfeit any trade secret rights plaintiff may have had to the problem check idea. He went on, however, to testify that he had no intention and did nothing to lead anyone to believe, that plaintiff was willing to waive its patent rights to the problem check invention as a result of the discussions and submissions.

Warshawsky, in his July 6, 1954, letter, did not ask to be advised of any patents or pending patent applications which the submitting parties had on any of their suggestions. Moreover, even if the letter had, plaintiff cannot be said to have concealed information from defendant since at the time of the August through September 1954 submissions plaintiff had neither a patent nor a patent application on its problem check feature. The record shows that an application on the device was not filed until April 20, 1955, and the patent did not issue until January 10, 1961.

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[18] *Shatterproof Glass Corp. v. Guardian Glass Co.*, 322 F. Supp. 854, 168 USPQ 212, 220 (E.D. Mich. 1970), *aff'd*, 462 F. 2d 1115 (6th Cir. 1972), *cert. denied*, 409 U.S. 1039.

Furthermore, interpreting the Warshawsky letter to require a disclosure of patents and pending applications would be inconsistent with the established Government position to ignore such factors in evaluating submissions and carrying out negotiations for Government contracts. In fact, in 38 Comp. Gen. 276, 278 (1958), the Comptroller General has ruled that the availability of 28 U.S.C. § 1498 as a remedy for a patent owner requires the Government to accept advertised bids which are alleged to infringe a patent:

> It is our view, however, that section 1498 appears clearly to constitute a modification of the patent law by limiting the rights of patentees insofar as procurement of supplies by the Government may be concerned, and by vesting in the Government a right to the use of any patents granted by it upon payment of reasonable compensation for such use. We believe that the statute is not consistent with any duty on the part of a contracting agency of the Government to protect the interests of patentees or licensees with respect to articles which it proposes to purchase, since the statute itself defines and provides an exclusive remedy for enforcement of the patentee's rights as to the Government. Any other interpretation would appear to us to impose an impossible burden upon Government procurement officials to determine the applicability and validity of any patents affecting any articles desired.

See also, 39 Comp. Gen. 760 (1960), and *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331 (1928).

Defendant's argument fails for the additional reason that it has not shown how it has relied on plaintiff's conduct to its detriment.[19] Defendant leaves this necessary element of its estoppel argument for our private speculation since no showing has been made on the point. To the contrary, the record shows that the Air Force was eager to obtain the

[19] Even assuming that defendant could make out an estoppel on the basis of plaintiff's alleged concealment of material facts, plaintiff would have at most been estopped from recovering for defendant's use of problem check in connection with the WADC analog computer. There has been no showing that defendant relied upon plaintiff's acts to purchase any other computers incorporating problem check. *See generally*, 31 C.J.S., Sec. 150, and, specifically, *American Republic Corp.* v. *Houston Oil Co.*, 173 F. 2d 728 (5th Cir. 1949), *cert. denied*, 338 U.S. 858; *Orr* v. *Mutual Life Ins. Co.*, 64 F. 2d 561 (8th Cir. 1933). Moreover, since plaintiff was the supplier of the WADC facility, it cannot complain of defendant's use of the problem check invention at that facility.

best equipment that it could for its WADC computer facility and it seems highly unlikely that it would not have included plaintiff's problem check feature in its specification. This is evidenced from Mr. Warshawsky's own appraisal of the feature as "a unique and definite advance in the art." Thus, even if plaintiff had indicated that it then had or would seek a patent on its problem check invention, it is unlikely that it would have made any difference to the Air Force. The conclusion that the Air Force would not have been concerned about uncertain rights that plaintiff may or may not have been able to obtain as a result of a pending application finds further support from the fact that the Government has in this instance continued to purchase accused devices even after it learned of plaintiff's patent. In striking down a similar estoppel argument, this court said in *Alford* v. *United States*, 151 USPQ 416, 420 (Trial Div. Ct. Cl. 1966), 179 Ct. Cl. 938, 945 (1967):

> Defendant contends that plaintiff should be estopped to deny the existence of a royalty-free license because he failed to inform the Navy in 1948 of his pending patent application that covered the subject invention, thus inducing the Navy to believe that any subsequent procurement of antennas substantially identical with the 1214 antenna would not involve a protected invention.
>
> First of all, Alford was under no contractual obligation to notify the Navy about any background invention. Nor did Alford have any role in the decision-making process to purchase the AS–768 antennas. It was not until 4 years after Alford delivered the 1214 antennas to the Navy that the Navy, unknown to Alford, began purchasing the AS–768 antennas. Alford cannot be charged with remaining silent while knowingly permitting the Navy to purchase the AS–768 antennas. It was not until 1958 that Alford, on his own, became aware that the Navy was using antennas that were substantially identical to the 1214 antenna that he furnished to the Navy. Nor can it be said that the existence of a royalty-free license was material to the Navy's decision to purchase the AS–768 antennas, because the Navy continued to purchase the antennas after it was informed of the plaintiff's position. Defendant's license by estoppel theory is not sound.

Accordingly, it is concluded that defendant has not established that plaintiff is estopped to deny the existence of a royalty-free license because of the concealment of material facts from the Air Force during preliminary discussions concerning the WADC computer facility.

Defendant also contends that plaintiff falsely represented to the Navy that a patent had been applied for during negotiations leading to the award of supply contract NOas 55–603-f, and as a result defendant agreed to exclude "* * * the patent rights clause that ordinarily would be included in the procurement of not yet fully developed equipment." To begin, defendant cites no authority to support its position that a patent rights clause would be included in a procurement contract for "not yet fully developed equipment." Moreover, as has been persuasively explained by plaintiff, its December 29, 1954, letter was prepared by a layman who at the time of the proposal was aware of efforts being made by plaintiff to patent the problem check invention. Defendant introduced no evidence to show that the statement was deliberately made to deprive defendant of any rights and it is just as reasonable to assume that it was made out of an awareness of plaintiff's in-house efforts to have a patent application prepared on the problem check invention. Accordingly, the use of the phrase "patent applied for" appears to be nothing more than a good faith effort to alert defendant of plaintiff's intention to proceed with the preparation of an application to patent the McCoy problem check invention.

However, even assuming that the above act does amount to a false statement by plaintiff, defendant's effort to establish the necessary elements of estoppel still falls short of the mark. Specifically, defendant has failed to show how it has relied on the statement to its detriment. Indeed, under the facts of this case, defendant would not have been entitled to any rights to the problem check invention even if it had included a patent rights clause in the NOas 55–603–f contract.

Looking to the facts surrounding the award of the '603–f contract, it should be recalled that plaintiff on December 29, 1954, submitted its letter of proposal, at the Navy's request.

In the course of describing its C–400 computer, the proposal also described plaintiff's new problem check feature. The description included the notation that a patent to cover the problem check feature of the REAC C–400 computer had been applied for. In actuality, plaintiff did not file an application on the invention until April 20, 1955. However, as has been explained in considerable detail, specifications and drawings, as well as some components for the REAC C–400 series computers, were completed prior to November 1954. Further, after receiving its first order from the Farnsworth Co., plaintiff started building the first REAC C–400 in November of 1954 and, by March of 1955, had successfully demonstrated the ability of the static problem check circuit to authenticate the programming of a simple problem at the New York IRE show.

On the other hand, Navy contract NOas 55–603–f was not entered into until November 3, 1955, a date long after plaintiff's conception and reduction to practice of the invention. Therefore, even if defendant had included a standard patent rights clause in that contract, the clause would not have entitled plaintiff to any rights under the McCoy patent. Accordingly, defendant has failed to show that it was injured by the exclusion of such a clause and its estoppel argument necessarily fails.

In sum, claims 7, 8 and 13 of McCoy patent 2,967,997 are valid and the inventions covered thereby are found to have been used and/or manufactured by or for defendant without authorization or license from plaintiff.

CONCLUSION OF LAW

Upon the findings of fact and the foregoing opinion, which are made a part of the judgment herein, the court concludes as a matter of law that claims 7, 8 and 13 of United States Letters Patent No. 2,967,997 are valid and have been used and/or manufactured by or for defendant without authorization or license from plaintiff, that plaintiff is entitled to recover reasonable and entire compensation therefor, and judgment is entered to that effect. The amount of recovery will be determined pursuant to Rule 131(c)(2).

Syllabus

532 F. 2d 739

JOSEPH PICKARD'S SONS COMPANY v. THE UNITED STATES

[No. 184–74. Decided April 14, 1976]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Contracts; disputes; change order; delays; damages; jury verdict.—Following an invitation for bids, plaintiff was awarded a contract to supply an improved type of prefabricated landing mat for aircraft. As the result of problems encountered during actual service, the procuring authority concluded that faulty welding was a principal source of the difficulties, and replaced the general "good commercial practice" welding workmanship standard of the contract specifications with more detailed requirements, ultimately effected by a contract modification. While the Armed Services Board of Contract Appeals awarded plaintiff an equitable adjustment for increased labor and material costs of welding, it rejected for want of proof plaintiff's request for compensation for decreased productivity (and resulting delay in contract completion) measured by the increase in end-product rejections that plaintiff contended must have been attributable to the more demanding welding requirements. Plaintiff seeks to recover the costs denied by the Board. It is *held* that plaintiff's proposed damage figure measured by a portion of total 1967 production costs computed on the basis of the difference between the percentage relationship of rejects to total production before the change order and after is unacceptable. The general requirement that the amount of a damage award be supported by direct proof of loss is not displaced by a bare showing that the contract was breached. Plaintiff could readily have documented the details of the post-change order rejections that would have passed muster under the superseded specifications, as well as the time and added cost of remedying the defects involved. Plaintiff is not entitled to recover, its motion for summary judgment is denied, defendant's cross-motion is granted, and the petition is dismissed.

Contracts; changes; change order; effect on productivity; audit verification.

[1] An audit verification by the Government of plaintiff's contract production and rejection figures does not amount to an admission of Government responsibility for decreased productivity allegedly attributable to more demanding welding requirements imposed by a change order.

United States ⇨ 70(25)

Opinion of Trial Judge

Contracts; damages; jury verdict.

[2] While it is true in a contract dispute that a clear showing of liability is indispensable to a recovery, it is equally well-settled that the amount of recovery can only be approximated in the format of a "jury verdict" where the claimant can demonstrate a justifiable inability to substantiate the amount of his resultant injury by direct and specific proof.

United States ⇐ 73(21)

Contracts; damages; jury verdict.

[3] Use of a jury verdict measure of damages requires an unmistakable showing that a legal injury has occurred and that for reasons beyond its control, typically the conduct of defendant, plaintiff was prevented from specifically proving its damages.

United States ⇐ 73(21)

Daniel M. Ross, attorney of record, for plaintiff. *Glade F. Flake* and *Peter S. Latham*, of counsel.

Marc J. Fink, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before DAVIS, SKELTON and KASHIWA, *Judges*.

PER CURIAM: This case comes before the court on defendant's motion, filed January 6, 1976, moving that the court adopt, as the basis for its judgment in this case, the recommended decision of Trial Judge George Willi, filed November 24, 1975, pursuant to Rule 166(c) on plaintiff's motion and defendant's cross-motion for summary judgment since plaintiff has failed to file a request for review thereof by the court and the time for so filing under the Rules of the court has expired. Upon consideration thereof, without oral argument, since the court agrees with the trial judge's recommended decision, as hereinafter set forth, it hereby grants defendant's said motion and affirms and adopts the recommended decision as the basis for its judgment in this case. Therefore, plaintiff's motion for summary judgment is denied, defendant's motion for summary judgment is granted and plaintiff's petition is dismissed.

OPINION OF TRIAL JUDGE

WILLI, *Trial Judge:* Plaintiff brings this suit to attack the validity, according to Wunderlich Act[1] standards, of one

[1] 41 U.S.C. §§ 321–22 (1970).

facet of an April 24, 1973 decision by the Armed Services Board of Contract Appeals (the Board) denying recovery of costs allegedly attributable to delay caused by the issuance of a change order dealing with welding specifications in a supply contract for an improved type of prefabricated landing mat for aircraft. *Joseph Pickard's Sons Co.*, 73–1 BCA ¶ 10,026. Plaintiff takes no exception to the allowance approved by the Board for the direct costs that it claimed in respect to the change. Similarly, it does not challenge any of the subsidiary factual determinations made by the Board concerning the delay claim; only the Board's ultimate conclusion that the change was not sufficiently shown to have caused the delay costs for which compensation is sought.

Plaintiff, a first-time Government prime contractor, is otherwise a Philadelphia-based manufacturer of pile wire and brazed die needles used in the fabrication of rugs, carpets, canvas and other heavy textile items.

On September 2, 1965, after a period of successful research and experimentation by the Army, the Defense Construction Supply Center issued an invitation for bids on a contract to supply a new type of steel landing mat for aircraft. A major improvement was the elimination of the round perforations that characterized the mats of World War II, permitting particles of surface dirt to rise and contaminate the moving parts of aircraft traversing them.

As the low responsible bidder, plaintiff was awarded a contract on October 19, 1965 for 38,336 13-member bundles of landing mats at a total price of $9,109,783.68. The contract contained standard Disputes and Changes clauses and also extended the Government a 100 percent option quantity at the same unit price. On October 28, 1965, that option was exercised so that the contract to be performed called for 79,762 bundles of mats to be delivered from March through October 1966 at a price of $18,105,326.08.

Plaintiff elected to perform its contract in a separate facility that it appropriated exclusively to that use. Promptly after receiving the award plaintiff set about establishing a high-volume production line in the specialized facility. It experienced various difficulties in perfecting the line and con-

sequently produced no mats for delivery until late March 1966. Production problems persisted so that, as against a contract completion date of October 1966, by December 31, 1966 plaintiff had delivered less than one-third of its total contractual commitment. The completion date was ultimately extended by agreement and performance eventually completed in May of 1968.

As soon as plaintiff's deliveries began, its mats, together with those of others suppliers, were promptly shipped to Vietnam and put in service there. The overseas using activities shortly notified the procuring authorities that the mats generally, including those supplied by plaintiff, presented so many burrs and sharp edges that excessive aircraft tire wear was resulting.

After study and investigation of the problem, the procuring authorities concluded that faulty welding was a principal source of the difficulties encountered in the field. To remedy the situation they decided to replace the general "good commercial practice" welding workmanship standard of the contract specifications with a set of considerably more detailed requirements, including one that called for a 4,000 pound static pressure test of any coverplates deemed suspect on visual inspection. Promulgation of the new requirements was first attempted by way of an October 14, 1966 letter from the Contracting Officer to the plaintiff. The letter characterized the detailed welding criteria spelled out in it as only clarifying rather than enlarging the original contract specifications. When plaintiff received the letter it promptly demurred, insisting that the new welding instructions did indeed increase the stringency of the specifications and adding that compliance with them would consequently entail additional costs. Plaintiff therefore requested that the new directives be instituted by a formal change order rather than by letter. This was done by a contract modification issued October 31, 1966. Plaintiff thereupon requested that the effective date of the modification be deferred until November 21, 1966 so that it could acclimate its personnel and operations to what it regarded as the new and different ground rules defining acceptable welding. Its request was granted and the modification implemented accordingly.

The Board agreed with the plaintiff that the supplementary welding requirements changed the contract's specifications in a manner that increase both the labor and material costs of welding. It therefore awarded plaintiff an equitable adjustment of $124,001.88 on those accounts.

In addition, plaintiff claimed that it was due $851,418.54 to compensate it for decreased productivity (and resultant delay in contract completion) measured by the increase in end-product rejections that it contended must have been attributable to the more demanding welding requirements imposed by the change order. The proposed damage figure consisted of that portion of plaintiff's total 1967 [2] production costs represented by the difference between the percentage relationship of rejects to total production before the change order and after. A representative of the Defense Contract Audit Administration (DCAA) verified the essential correctness of the fact, but not the alleged cause, of the relative increase in average rejection rate and average decrease in weekly production. The Board denied the claim for want of any direct proof associating identifiable added costs with production delays resulting from the new welding requirements. The DCAA audit verification of plaintiff's production and rejection figures did not, of course, amount to an admission of Government responsibility for decreased productivity. *Boyajian* v. *United States*, 191 Ct. Cl. 233, 247, 423 F. 2d 1231, 1239 (1970).

Addressing plaintiff's statistical presentation, indicating that on an overall average basis its rate of rejections was measurably greater after the change order than before, the Board made several points. First, it called attention to various discrepancies and inconsistencies in the several editions of statistical data proffered by plaintiff to substantiate a post-change order increase in rejection rate. Second, it pointed to undisputed facts showing that there was no consistent correlation between volume of production and quantity of rejections when compared on a monthly basis, thereby undermining any inference that decreased production was attributable to increased rejections. Finally, it referred to the

[2] Plaintiff excludes 1968 performance costs from its calculations because the parties had agreed administratively to a production stretchout in 1968 at no additional cost to the Government.

Government's evidence affirmatively showing a number of different causes of reduced production after the change order, all of which were apparently unrelated to it. The Board observed that plaintiff had not attempted to show that the frequency and nature of these post-change order difficulties were comparable to those experienced theretofore.

Turning to the question of damages, the Board found inexcusable plaintiff's failure to adduce any direct evidence of increased costs resulting from delay caused by the change order. It recalled that plaintiff had resisted the substance of the change order when first proposed and had expressly forecast that imposition of the revised standards that were in contemplation would increase performance costs. Moreover, it had secured a 3-week moratorium on enforcement of the order after its issuance in order to prepare for operations under it. In those circumstances the Board found fatally defective plaintiff's acknowledged failure to assemble any evidence directly connecting decreased production efficiency and consequent cost increases with differences between the original and supplementary welding standards. That failure, it is parenthetically noted, becomes even more telling when considered in light of the fact that throughout performance plaintiff operated with a product inspection force that was twice as large as it had planned and for which the Board allowed it additional compensation of $133,633.73. Thus fortified with inspection personnel, it would seem that plaintiff could readily have documented the details of those post-change order rejections that would have passed muster under the superseded specifications, as well as the time and added cost of remedying the defects involved.

The Board summarized its conclusion on the claim in suit as follows (73–1 BCA at 47,075):

> We do not deny that there may have been some production loss as a result of * * * [the change order]. However we conclude that the appellant has failed to present any evidence which would reasonably establish that the costs claimed are in whole or in part attributable to that * * * [change order]. A statistical circumstantial presentation supported by allegations does not constitute proof. The appellant has failed to show a causal connection between the amounts claimed and the alleged cause.

Opinion of Trial Judge

To upset the Board's decision plaintiff first repeats the same *res ipsa loquitur*-like theory of contract liability that it urged there. It therefore contends that the undisputed post-change order increase in rejection rate was enough to make out a *prima facie* case of liability. The Board acknowledged as much, plaintiff says, in the first sentence of the language from its decision, quoted above. Plaintiff also discounts the rebuttal significance, on its *prima facie* case, of the affirmative evidence of post-change order production interruptions caused by factors totally extrinsic to the revised welding specifications by pointing out that the Government failed to prove that pre-change order production was not similarly inhibited.

Treating liability as thus established, plaintiff then proceeds to justify its general approximation of damages, not by undertaking to explain its inability to produce any evidence of actual damage from delay but by expansively invoking the maxim that where liability is established "absolute certainty or precise mathematical accuracy" is not an invariable prerequisite to a damage award. *Dale Constr. Co.* v. *United States*, 168 Ct. Cl. 692, 729 (1964) and cases cited therein. In short, plaintiff says that because liability was shown, it was entitled to receive a so-called "jury verdict" type of damage award from the Board.

Though defendant suggests at the outset that plaintiff should fail in any event because the damages that it seeks are of the generally disfavored "total cost" variety,[3] a holding on that ground (which plaintiff disputes) is unnecessary because whatever the case in that regard the inescapable fallacy in plaintiff's position on proof of damages is the presupposition that in a contract dispute the general requirement that the amount of a damage award be supported by direct proof of loss is displaced by a bare showing that the contract has definitely been breached.

While it is true that a clear showing of liability is indispensable to a recovery, it is equally well-settled that the amount of the recovery can only be approximated in the format of a "jury verdict" where the claimant can demon-

[3] *Boyajian* v. *United States*, 191 Ct. Cl. 233, 245, 423 F. 2d 1231, 1238–39 (1970), and cases cited therein.

strate a justifiable inability to substantiate the amount of his resultant injury by direct and specific proof; something that, according to the Board's unchallenged factual determinations, was not done here.

It appears that this court first approved a jury verdict measure of damages in *Needles* v. *United States*, 101 Ct. Cl. 535 (1944), a contract case involving a series of manifest Government breaches that culminated in a wrongful termination by it. For the proposition that where liability is so clearly established absolute certainty in the measure of damages is not always required, the court relied on *Eastman Kodak Co.* v. *Southern Photo Material Co.*, 273 U.S. 359 (1927), and *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).[4] Significantly, the court particularly cited the following language from *Story*, *supra* (at 562–63):

> Upon a consideration of the evidence we are of opinion that it was open to the jury to find that the price cutting and the resulting lower prices were directly attributable to the unlawful combination; and that the assumption indulged by the court below, that respondents' acts would have been the same if they had been acting independently of one another, with the same resulting curtailment of prices, must be rejected as unsound.
>
> Nor can we accept the view of that court that the verdict of the jury, in so far as it included damages for the first item, cannot stand because it was based upon mere speculation and conjecture. This characterization of the basis for the verdict is unwarranted. It is true that *there was uncertainty as to the extent of the damage, but there was none as to the fact of damage;* and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. *The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong*, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. *Taylor* v. *Bradley*, 4 Abb. Ct. App. (N.Y.) 363, 366–367:
>
> "It is sometimes said that speculative damages cannot be recovered, because the amount is uncertain; but

[4] 101 Ct. Cl. at 619.

such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too remote. This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of.

"The general rule is, that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount."

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. *In such case*, while the damages may not be determined by mere speculation or guess, *it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U.S. 359, 379. Compare *The Seven Brothers*, 170 Fed. 126, 128; *Pacific Whaling Co.* v. *Packers' Assn.*, 138 Cal. 632, 638. As the Supreme Court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party. *Allison* v. *Chandler*, 11 Mich. 542, 550–556. [Emphasis added.]

In *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251 (1946), a case, like *Eastman* and *Story Parchment* before it, involving a challenge to a jury's approximation of civil damages flowing from antitrust violations, the Court again approved such an award in appropriate circumstances and in so doing reemphasized the twin requirements that such circumstances must include an unmistakable showing (1) that a legal injury has occurred and (2) that for reasons beyond its control, typically the conduct of the defendant, the claimant was prevented from specifically proving its damages. 327 U.S. at 263–66.

Conclusion

More recently the Court has again made clear that relaxation of the requirement that an injured party support his damage claim with definite and specific proof may be countenanced only where such proof is not reasonably available to him. Thus, in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), another civil antitrust damage suit where a jury's approximation was approved, it said: "Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; *damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.*" (Emphasis added.) *See also Simon* v. *New Haven Board & Carton Co.*, 516 F. 2d 303, 306 (2d Cir. 1975).

In asking for damages measured by a fraction of total 1967 production costs the plaintiff has offered neither the Board nor this court any explanation, much less justification for its total failure to present direct proof of additional costs that resulted from delay stemming from the change order dealing with welding. Certainly there was nothing inherent in the change order action, of which plaintiff had ample advance notice, that would realistically have prevented it from assembling such proof. Clear and consistent Supreme Court doctrine requires that plaintiff's claim be denied for lack of adequate proof of damage.

CONCLUSION

For the reasons given, plaintiff's motion for summary judgment is denied, defendant's motion for summary judgment is granted, and the petition is dismissed.

CONGRESSIONAL REFERENCE

(The following Reports were filed pursuant to the Act of October 15, 1966, 80 Stat. 958, providing for the reporting of congressional reference cases by commissioners of the Court of Claims)

CROWN COAT FRONT CO., INC. v. THE UNITED STATES

[Cong. Ref. No. 5–72. Filed February 3, 1976. Plaintiff's motion for rehearing denied March 4, 1976.]

REPORT TO THE UNITED STATES SENATE

Congressional reference; contracts; damages; rejection of material; testing procedures; contemporaneous v. later evidence; effect in congressional reference of findings made in prior suit at law.— This congressional reference was referred to the Chief Commissioner of this court by S. Res. 290 (92d Cong., 2d Sess.), pursuant to 28 U.S.C. §§ 1492 and 2509. Plaintiff entered into two contracts to manufacture for the Government canteen covers lined with felt impregnated with a mildew inhibitor. In an opinion reported at 154 Ct. Cl. 613, 292 F. 2d 290 (1961), this court concluded that plaintiff was not entitled to recover damages, plaintiff having argued that the Government breached the contract by rejecting the felt on the basis of tests not specified in the contract. Plaintiff also filed suit in a district court which, after lengthy litigation (including remand by the Supreme Court), held that the suit was barred by the statute of limitations. In the present congressional reference plaintiff-claimant contends that (1) the colorimetric test itself is subject to inaccuracy and unreliability, (2) defendant acted unfairly by failing also to perform the Parr chloride test on the felt, (3) since the felt was ultimately accepted and used by the Government, it was inequitable and unjust for defendant to reject plaintiff's felt samples and to request, on each event, that plaintiff submit an offer in price reduction, and (4) the whole process of testing, rejection, negotiation and acceptance disrupted plaintiff's performance schedule so as to cause plaintiff substantial losses. On January 31, 1975 Trial Commissioner Cooper filed an opinion, findings of fact and a recommended conclusion, in which he concluded that plaintiff has no claim of an equitable nature against the United States and that any payment to it would be a gratuity. A claim of a legal nature was pre-

cluded by the earlier legal proceedings. On February 3, 1976 the Review Panel agreed with and adopted said opinion, findings and conclusion, and dismissed plaintiff's objections to the procedure followed by the trial commissioner who held himself, under the circumstances of this case, not bound by the findings of fact in the earlier decision on the claim in this court, and had ruled that the findings could be objected to on the basis of new evidence, and that those findings against which no new evidence was raised could be adopted, provided they were relevant and material. The Review Panel recommended to the Congress that plaintiff has neither a legal nor equitable claim against the United States, and that any payment on the claim would be a gratuity.

Evidence; weight and sufficiency of evidence; test procedures.

[1] The contemporaneous respect accorded tests of a contract item by the parties themselves is entitled to much more weight than tests conducted many years later on a similar item of unknown origin and condition.

Contracts; breach; obligation under contract; what constitutes.

[2] While both the colorimetric test and the Parr chloride test may have been standard procedure for the Government to use in testing felt material, where plaintiff did not object to the single-test procedure and results of the colorimetric test, and where plaintiff has failed to show that the Parr chloride test was a superior test, that it would have produced different results, that the Government had any obligation to use that test, or that plaintiff was disadvantaged, it was not inequitable for the Government to use the single-test procedure.

Contracts; specifications; right of Government to compliance with.

[3] The Government has the right to insist on the contractor's compliance with the contract specifications.

Contracts; specifications; deviations from specifications; right of Government to price reduction.

[4] The Government's agreement to accept nonspecification materials does not deprive it of its right to insist on a price reduction.

Congressional reference; findings of Commissioner in prior suit in Court of Claims; use of in congressional reference case.

[5] While application of the doctrine of res judicata may be appropriate in a congressional reference proceeding between the parties to findings of fact in earlier proceedings at law, provided the Court of Claims has not been directed otherwise by the Congress, the trial commissioner was correct in holding that the facts found in the earlier proceedings at law are not binding in the present congressional reference, that the findings could be objected to on the basis of new evidence, and that those findings against which no new evidence was raised could be adopted, provided they were relevant and material.

Edwin J. McDermott, attorney of record, for plaintiff.

Raymond B. Benzinger, with whom was *Rex E. Lee*, *Assistant Attorney General*, for defendant.

OPINION*

COOPER, *Trial Commissioner:* On September 26, 1972, the Senate referred S. 3451, 92d Cong., 2d Sess., a bill for the relief of the Crown Coat Front Co., Inc., to the Chief Commissioner for proceedings in accordance with 28 U.S.C. §§ 1492 and 2509 (1970). The bill proposes that the Secretary of the Treasury be authorized and directed to pay Crown Coat Front Co., Inc.,

> * * * the sum of $95,000, in full satisfaction of all claims of such company against the United States for reimbursement for losses incurred under contracts numbered QM–7726, dated April 26, 1956, and QM–7796, dated May 14, 1956, entered into between such company and the United States, such losses having occurred as the result of inadequate testing by the United States * * *.

The two contracts in issue were for the manufacture of canteen covers lined with felt. Plaintiff originally bid for the manufacture of 760,000 dismounted canteen covers. After a preaward survey, however, the Government, pursuant to its reserved right to make an award for less than the amount bid, awarded plaintiff contract No. QM–7726–OI–2391–E–56 (hereinafter QM–7726) for 350,000 units. The contract called for monthly deliveries in specified quantities between July 25 and November 24, 1956. Plaintiff protested this reduction in quantity but agreed to accept the award. The protest was withdrawn after plaintiff negotiated a separate contract, No. QM–7796–OI–2567–E–56 (hereinafter QM–7796), for 89,786 additional covers.

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*The opinion, findings of fact, and conclusions are submitted under the order of reference and the Rules of the Chief Commissioner. The findings of fact are not printed here. The parties stipulated that the entire record in *Crown Coat Front Co.* v. *United States*, 154 Ct. Cl. 613, 292 F. 2d 290 (1961), is to be included in and considered a part of the record in this case. Findings from the earlier decision, where material, relevant, and supported by the entire record as a whole, have been adopted herein.

From the outset, plaintiff had difficulty in meeting its contract schedule. After one time extension, plaintiff was able to deliver all of the 89,786 covers under contract QM–7796. After two time extensions and a partial convenience termination reducing the units due under contract QM–7726 from 350,000 to 284,000, plaintiff actually delivered 251,600 covers before the contract was terminated for default.

Most of the work on the contracts was performed concurrently. Both contracts provided that preproduction samples of component parts were to be submitted for specification testing by the Government. One of the tests conducted by defendant, the colorimetric test, was used to determine if the felt samples contained the required amount of mildew inhibitor (DDDM). Since the requirements for the felt were the same under both contracts, and all of the felt came from the same supplier, the Government conducted only one series of tests on each lot.

On the basis of the colorimetric-test results, the Government rejected 10 out of the 12 lots submitted due to unacceptable mildew-inhibitor content. All of the felt was, however, used on the contract because, for each rejected lot, plaintiff offered, and the Government accepted, a price reduction. Out of the 89,786 covers delivered under contract QM–7796, 54,000 contained nonspecification felt. For this deviation, the original contract price of $60,691.76 was reduced by $270.01. In consideration of the time extension granted, an additional $112.23 was deducted from the contract price. Out of the 251,600 covers delivered under contract QM–7726, 234,824 contained nonspecification felt. The original contract price of $204,750 was reduced by $1,334.14 for this deviation; a reduction of $320.20 was also agreed upon for 33,680 units containing nonspecification thread, as well as a $1,272.50 reduction in consideration of the two time extensions granted.

Plaintiff contends that the colorimetric test "is very inaccurate and unreliable" and "was an ineffective method for determining the mildew-inhibitor content of colored felt." Therefore, plaintiff argues, it was "inequitable and unjust for the defendant to have not only rejected plaintiff's felt samples by the colorimetric method, but also to have insisted that each sample of felt be tested, reported, rejected, price

reduction offered, evaluated, considered and accepted." Accordingly, plaintiff seeks to recover, upon principles of "general equitable considerations," $80,397.96 of "losses" sustained on the contract, such alleged losses consisting primarily of delay costs for an aggregate of 442 days.

Plaintiff's present contentions are largely a repeat, with some variations in theme, of the unsuccessful theories asserted by plaintiff in its previous efforts to recover on these contracts. (Findings 35–39). Plaintiff first argued to the Armed Services Board of Contract Appeals that its delay on contract QM–7726 was excusable because the Government took an unreasonably long time in finally accepting the felt. After the Board rejected this contention,[1] plaintiff argued it again to this court in *Crown Coat Front Co.* v. *United States* (Ct. Cl. No. 222–58), 154 Ct. Cl. 613, 292 F. 2d 290 (1961), along with the argument that the Government breached the contract by rejecting the felt on the basis of tests not specified in the contract. This court held that (1) under a proper interpretation of the contract, the Government could perform reasonable and necessary tests to determine if the submitted materials complied with the specifications; (2) the colorimetric tests used by the Government were reasonable and necessary and were accomplished without undue delay; and (3) plaintiff itself was responsible for the delay by repeatedly accepting nonspecification felt from its supplier.

In connection with contract QM–7796, plaintiff sought an equitable adjustment for the delay costs allegedly incurred as a result of the rejections of the felt. Plaintiff also argued to the ASBCA that the colorimetric tests were improper, because, again, the contract did not specify that test and because the Parr chloride test was not also performed. None of these arguments prevailed.[2]

Before any decision by the Board in the latter case, plaintiff also filed a breach of contract action in this court. After the ASBCA ruled against it, plaintiff sought to have that decision overturned in the United States District Court for the Southern District of New York. The United States Court

[1] ASBCA No. 4445, 58–2 BCA ¶ 1898.
[2] ASBCA No. 8090, 1963 BCA ¶ 3681.

of Claims suit was dismissed without prejudice due to the pendency of the district court action. After extensive litigation, set out more fully in the findings, including a Supreme Court decision and remand, and denial of certiorari after remand,[3] plaintiff's suit in the district court was held to be barred by the statute of limitations. The Court of Claims subsequently denied plaintiff's motion to reinstate its petition; however, the issues raised in that petition were substantially similar to those decided by the court in Ct. Cl. No. 222–58. In any event, it was plaintiff's legal strategy and maneuvering that precluded further adjudication on QM–7796.

In its petition here, plaintiff makes four major contentions that (1) the colorimetric test itself is subject to inaccuracy and unreliability; (2) defendant acted unfairly by failing also to perform the Parr chloride test on the felt; (3) since the felt was ultimately accepted and used by the Government, it was inequitable and unjust for defendant to reject plaintiff's felt samples and to request, on each event, that plaintiff submit an offer in price reduction; (4) the whole process of testing, rejection, negotiation, and acceptance disrupted plaintiff's performance schedule so as to cause plaintiff substantial losses.

In support of its first contention, plaintiff has presented the testimony of one expert, Dr. Wood, who investigated, at plaintiff's request, the reliability and reproducibility of the colorimetric test. All of Dr. Wood's testimony concerning possible sources of error in the colorimetric test was based on experiments he conducted expressly for this proceeding and which are summarized in the findings. The bulk of Dr. Wood's dissatisfaction with the test was based on his experience of rapid color fading within the first few hours and confusion of the DDDM color with the dye color. Both of these, according to Dr. Wood's testimony, however, would always yield results reflecting more DDDM than actually present, never less. Since all of the felt rejected by the Government contained too little DDDM content, these problems, assum-

[3] *Crown Coat Front Co.* v. *United States*, 363 F. 2d 407 (2d Cir. 1966) (en banc); 386 U.S. 503 (1967) (*rev'd and remanding*); 275 F. Supp. 10 (S.D. N.Y. 1967) (on remand); *aff'd.* 395 F. 2d 160 (2d Cir. 1968), *cert. denied*, 393 U.S. 853 (1968)

ing they do constitute deficiencies in the test, would only have been beneficial to plaintiff. Dr. Wood also testified as to other possible sources of error suggested by his experiments: loss of DDDM in the extraction process; inefficiency of the extraction process; and removal of some DDDM through the addition of the moisture-resistant treatment. Some of the irregularity in results observed by Dr. Wood may be explained by certain deviations in his procedures, as pointed out by Government witnesses. In any event, the minor deficiencies observed by Dr. Wood are not sufficient grounds to discredit the colorimetric test, which has had longstanding and widespread use in Government and industry.

Dr. Wood conceded that all analytical procedures have weaknesses and admitted that he knows of no test better than the colorimetric test. Government witnesses also conceded that the colorimetric test is not perfect but contended that it gives reasonably accurate results.

It is worth noting, as this court and the ASBCA did in the previous decisions, that at no time during the performance of either of these contracts did plaintiff question the accuracy of the colorimetric test. When, at a later time, it argued to this court that use of the test was improper under the terms of the contracts, it still did not contend there was any inaccuracy or unreliability in the test. Indeed, plaintiff's own expert in Ct. Cl. No. 222–58 testified, *in direct examination*, that the colorimetric test was "accurate to a reasonable degree of accuracy."

It should also be noted that the present proceedings mark the first time in over 15 years that plaintiff has attempted to establish that the felt actually contained the required amount of DDDM. Dr. Wood's tests, the results of which are summarized in findings 43–45, were conducted on felt samples supplied by plaintiff's counsel and which were allegedly left over from the contracts in issue. However, a lack of satisfactory evidence regarding the origin of the felt samples analyzed, the conditions under which the felt had been kept over the years, and the effect of such a long lapse of time on the felt, preclude any significant weight being given to those test results. Moreover, the time for plaintiff to have contested the test results was back in 1956 when specific lots

of felt were being tested. Instead, it elected to sit back, neither conducting tests of its own nor challenging those of defendant. The plain fact is the parties treated the test results as correct at the time they were made, and conducted their business on that assumption. The contemporaneous respect accorded the tests by the parties themselves is entitled to much more weight than tests conducted many years later on a piece of felt of unknown origin and condition.

Accordingly, it is concluded that the colorimetric test is a reasonably accurate test; that plaintiff has failed to show that the felt it supplied did meet the specifications; and that plaintiff has failed to show any inequity in defendant's use of the colorimetric test in the administration of these contracts.

Plaintiff also contends that the Government acted improperly in not administering the Parr chloride test after the felt failed by the colorimetric method.[4] Plaintiff makes two arguments in support of this contention. First, plaintiff suggests it should have been used because the specifications for *Thread and Twine*, MIL–T–3530A (November 3, 1952), in existence at the time of the contracts, provide that if a material fails under the colorimetric test, the Parr chloride method is to then be used, and the results of that test are to be final. That argument fails because there is uncontradicted credible testimony that thread and twine are not similar in composition or character to felt, and, hence, the provisions of that specification would not necessarily be applicable to this contract. Second, plaintiff urges that it was standard procedure for the Government to use both tests. While there is evidence in the record, both in Ct. Cl. No. 222–58 and in this proceeding, that both tests were usually employed, plaintiff has failed to show that defendant had any obligation under these contracts to use that test.

The Parr chloride test has its weaknesses, as do all analytical procedures, and is subject to certain interferences. Since

[4] Apparently relying on the testimony of a Government witness to the effect that it was standard procedure for the Government to administer the Parr chloride test after the colorimetric method showed unsatisfactory results, this court, in Ct Cl. No. 222–58, made a finding that both tests had in fact been used. Both parties now agree this is in error as only the colorimetric test was performed.

plaintiff did not object to the colorimetric-test results at the time, and since the Parr chloride test would have involved additional time and delay, it is difficult to find any inequity in the single-test procedure used by defendant.[5] In the final analysis, plaintiff's failure to show any error in the colorimetric-test results renders the Parr chloride issue largely academic.

In sum, plaintiff has failed to show that the Parr chloride test was a superior test, that it would have produced any different results, that the Government had any obligation to use that test, or that plaintiff was disadvantaged either legally or in an equitable sense by the single-test procedure.

Plaintiff's last two contentions merit only brief mention. Since the Government actually used the canteen covers with the nonspecification felt, plaintiff argues, it was inequitable for the Government "to request * * * that plaintiff submit an offer in price reduction." In Ct. Cl. No. 222–58, this court found, with ample support in the record, that it was plaintiff who, upon each notification that the felt was unacceptable, initiated negotiations for a reduction of contract price. No evidence has been presented by plaintiff in this proceeding otherwise. The Government's right to insist on compliance with the contract specifications is well established. *H.L.C. & Associates Constr. Co.* v. *United States*, 176 Ct. Cl. 285, 367 F. 2d 586 (1966); *Farwell Co.* v. *United States*, 137 Ct. Cl. 832, 148 F. Supp. 947 (1957). It is equally well established that the Government's agreement to accept nonspecification materials does not deprive it of its right to insist on a price reduction. *Farwell Co.* v. *United States*, *supra*. In any event, the total price reductions were so small, $270.01 out of an original $60,691.76 on contract QM–7796 and $1,334.14 out of an original $204,750 on contract QM–7726, that the loss suffered by plaintiff was negligible, especially in view of the fact that over 80% of the covers delivered by plaintiff contained nonspecification felt.

Plaintiff's last contention is that "it was inequitable and unjust for the defendant * * * to have insisted that each sample of felt be tested, reported, rejected, price reduction

[5] On one occasion, plaintiff did request a retest and defendant promptly complied. Before the retest was completed, plaintiff offered a price reduction.

offered, evaluated, considered and accepted." This process, plaintiff alleges, caused it prolonged performance delays resulting in substantial losses on the contracts. However, this contention is largely answered by this court's conclusions in the earlier case, where it stated:

> * * * We think that the record establishes that plaintiff was responsible for most of the delay incident to the performance of the contract simply because plaintiff repeatedly accepted felt from its supplier, Western Felt Works, which failed to meet the requirements of the contract and specifications. Following each of several rejections by defendant, the supplier continued to assure plaintiff that its next shipment of felt would measure up to the Government's requirements. The goal was never realized. Plaintiff ultimately ceased to make protests to its supplier with respect to the quality of the felt being supplied and never made a change in its source of felt. It could have obtained felt from another supplier at considerably less cost, but did not elect to do so. [154 Ct. Cl. at 617, 292 F. 2d at 293.]

It was plaintiff's repeated submissions of nonconforming felt that was the root cause of the problems encountered under these contracts. Although the Government did ultimately conclude that the lack of adequate mildew inhibitor did not adversely affect the overall performance of the canteen covers, it also found that there was a cost savings to the contractor resulting from the omission of the inhibitor, the amount of the cost savings being dependent on the amount of inhibitor actually used. Also, some lots of felt were rejected for reasons in addition to inadequate inhibitor. Under these circumstances, the Government's testing and evaluation of each lot before agreeing to a price reduction was a reasonable, and responsible, method of handling the problem plaintiff created.

It is concluded that Crown Coat Front Co., Inc., has no claim of an equitable nature,[6] *see*, *Webb* v. *United States*, 192 Ct. Cl. 925 (1970); *Burkhardt* v. *United States*, 113 Ct. Cl. 658, 84 F. Supp. 553 (1949), against the United States and that any payment to it would be a gratuity.[7]

[6] Plaintiff has stipulated that it has no legal claim against the United States.

[7] In view of the conclusions reached, it is unnecessary to resolve the unpaid tax issue urged by defendant as a "set-off."

Opinion of the Review Panel

CONCLUSION

It is recommended that it be reported to the Senate that the claimant, Crown Coat Front Co., Inc., does not have any legal or equitable claim against the United States and that any payment to it would be a gratuity.

REPORT TO THE UNITED STATES SENATE

Before SCHWARTZ, *Presiding Commissioner of the Review Panel*, COLAIANNI and MILLER, *Commissioners*.

By THE REVIEW PANEL: Senate Resolution 290, 92d Cong., 2d Sess., of September 22, 1972, referred S. 3451, 92d Cong., 2d Sess., to the Chief Commissioner of the United States Court of Claims for proceedings and report pursuant to 28 U.S.C. §§ 1492 and 2509 (1970). S. 3451 would authorize the payment of $95,000 to the claimant, Crown Coat Front Co., Inc., to reimburse it for losses suffered under two contracts with the United States, No. QM–7726 of April 26, 1956, and No. QM–7796 of May 14, 1956, allegedly as the result of inadequate testing by the United States.

The Chief Commissioner referred the bill to Trial Commissioner Hal D. Cooper who on January 31, 1975, filed an opinion and detailed findings of fact and a recommended conclusion. The exceptions of the claimant-plaintiff to the opinion, findings and conclusion have been heard on briefs and at an oral hearing held on November 4, 1975.

Plaintiff's claims arising from both the contracts have previously been rejected in legal proceedings both in this court and other courts; in the latter proceedings the district court's dismissal of the claim was affirmed on appeal and certiorari was denied by the Supreme Court. *Crown Coat Front Co.* v. *United States*, 154 Ct. Cl. 613, 292 F.2d 290 (1961); *Crown Coat Front Co.* v. *United States*, 363 F.2d 407 (2d Cir. 1966) (en banc), 386 U.S. 503 (1967) (*rev'd and remanding*), 275 F. Supp. 10 (S.D.N.Y. 1967) (on re-

mand), *aff'd* 395 F.2d 160 (2d Cir. 1968), *cert. denied*, 393 U.S. 853 (1968). In the present proceeding, therefore, plaintiff stipulated that its claim was solely equitable, that is, that it made no legal claim against the United States. After trial on the merits Trial Commissioner Cooper filed an opinion and detailed findings of fact, on which he concluded that the plaintiff has no claim of an equitable nature against the United States and that any payment to it would be a gratuity. Accordingly, he recommended that it be reported to the Senate that the plaintiff does not have any legal or equitable claim against the United States and that any payment to it would be a gratuity.

On this proceeding for the review of the trial commissioner's decision, the plaintiff has made a variety of contentions critical of the decision. We have considered all the arguments made and found them to be without merit. None of them require discussion beyond what appears in Trial Commissioner Cooper's opinion, except for the contention that the trial commissioner erred in holding himself bound by the findings of fact in the earlier decision on the claim in this court. The questions raised by the contention are whether Trial Commissioner Cooper ruled that the facts found in the 1961 suit at law are binding in this Congressional Reference proceeding, and whether he erred in whatever rulings he did make. The substantive question was touched upon but not decided in *H & H Manufacturing Company* v. *United States*, Congressional Reference No. 3–70, 201 Ct. Cl. 799 (1972).

The first question is answered in the negative. The trial commissioner did not make such a ruling as is complained of. The parties having stipulated that the record in the 1961 proceeding in this court should be received in evidence, the trial commissioner in an order of June 8, 1973 directed that the parties advise which of the earlier factual findings would be stipulated and, as to findings on which the parties disagreed, that the objecting party identify the finding and indicate the factual basis for challenging it. In describing this order, the trial commissioner wrote, in a subsequent order of September 21, 1973, that it "does not assume that the findings in the prior litigation are

binding in this congressional reference proceeding"; rather that its purpose was to determine whether there was factual matters not in controversy which could be stipulated.

Thereafter, the plaintiff made denials of various findings of fact but failed to state either the basis for the denials or the facts believed to be correct. When directed to make such a statement, the plaintiff denied the factual content of 54 findings of fact for lack of knowledge, and demanded proof thereof. On this, the trial commissioner on December 19, 1973 entered an order that the statement of lack of knowledge should be construed as meaning that claimant had no evidence contrary to the finding of fact involved. Further, that those "prior findings to which no new evidence is directed shall be adopted in this case, provided they are relevant and material."

On the trial which followed, the plaintiff opposed the 61 findings of fact proposed by defendant from among the prior findings, on the grounds that plaintiff had introduced new evidence directed to those prior findings and that they were not relevant and material. These grounds were rejected on their merits by the trial commissioner, who on his consideration of the record, adopted a substantial number of the former findings, which he found to be "material, relevant, and supported by the entire record."

Findings of fact are binding in a second judicial proceeding between the same parties, under the classic principle of *res judicata*. A fundamental doctrine in our law is that issues once decided in litigation before a competent tribunal must remain settled as between the litigating parties, in the absence of fraud or comparable reason for reopening the matter.

There is arguably good reason to apply the doctrine in a Congressional Reference proceeding between the parties to an earlier proceeding at law, provided the House referring the case does not otherwise direct. But there is no need to pass on the question in the circumstances presented, for the trial commissioner did not invoke the principle of *res judicata*. He did not hold that the former findings were binding; he rather held that they could be objected to on the basis of new evidence, and that those

findings against which no new evidence was raised would be adopted, provided they were relevant and material Since the former record, including the findings on the evidence presented, was in evidence, and since these former findings had in the earlier proceeding been held well-based it was entirely correct for the trial commissioner to adopt those findings, once it appeared that an objecting party had no new evidence on the subject matter of the findings. In brief, the former findings were adopted on sufficient evidence.

Trial Commissioner Cooper acted with generosity to the plaintiff, in offering it the opportunity of introducing evidence to show error in the former findings of fact. The plaintiff's response—an objection to the former findings, without the production of any new evidence, and a demand for proof—was a default which left the plaintiff with no valid complaint, for the findings which are now criticized were adopted on the basis of supporting record evidence.

Because it is best, as always, that rules of law be evolved only as required by the case presented, especially in such an equitable and flexible proceeding as a Congressional Reference, we emphasize that our decision goes only so far as to hold that the claimant cannot complain of the treatment accorded it. We do not mean to hold—because it is unnecessary—that the principle of *res judicata* does not apply in a Congressional Reference proceeding which follows a proceeding at law, and we also express no opinion on the amount of and the weight to be given to any new evidence which under the procedure followed by the trial commissioner might be presented against a former finding. Our ruling is limited to a dismissal of the claimant's objection to the procedure followed by the trial commissioner, and, on the whole case, to an approval of the decision on trial.

The Senate is informed that the members of the Review Panel unanimously agree with and adopt the trial commissioner's findings, opinion and conclusion, which are included herein by reference, and which together with the foregoing remarks form the basis of our recommendation

Syllabus

that the claimant has neither a legal nor an equitable claim against the United States, and that any payment on the claim could be a gratuity.

SEAVIEW ELECTRIC COMPANY OR ITS SUCCESSORS IN INTEREST v. THE UNITED STATES

[Cong. Ref. No. 3–72. Filed March 29, 1976]

REPORT TO THE UNITED STATES HOUSE OF REPRESENTATIVE

Congressional reference; contracts; disqualification of trial commissioner; failure to hold trial prior to issuance of report.—This congressional reference was referred to the Chief Commissioner of this court by H. Res. 943 (92d Cong., 2d Sess.) pursuant to 28 U.S.C. §§ 1492 and 2509. Prior litigation in this court respecting the contract in issue is reported at 188 Ct. Cl. 979, 413 F. 2d 1147 (1969), *DeVito* v. *United States*, in which the court held that the conduct of the Government, following plaintiff's delinquency in required deliveries, in accepting subsequent deliveries by plaintiff constituted a constructive election to permit continued performance and a waiver of contract breach, and that absent a "cure" notice under the default clause of the contract, the default termination should be converted to a termination for convenience. The court returned the case to the Armed Services Board of Contract Appeals to determine costs recoverable by the contractor; thereafter a settlement agreement was negotiated whereby Seaview received a sum representing costs, profits, credits and settlement expenses. In the present congressional reference, Seaview alleges certain unfair, improper and discriminatory acts of the contracting officer leading to Seaview's bankruptcy and that the imposition of liquidated damages prevented Seaview from obtaining new contracts while being low bidder on advertised invitations for bids. On January 29, 1975 Trial Commissioner Harkins filed a report consisting of an opinion, findings of fact and conclusion (not reported here in full text), concluding that Seaview and its successors in interest have neither a legal nor equitable claim. Seaview filed exceptions to the report asserting that Trial Commissioner Harkins should have disqualified himself and that no trial was held prior to issuance of the report. On March 29, 1976 the Review Panel determined that the exceptions are not meritorious, there being no record basis on which Trial Commissioner Harkins should have disqualified himself from handling this reference at the trial level, and, in view of the pretrial submissions and proceedings, the failure to hold a trial not being sufficient reason to justify reversal of the report and remand of the case for holding a trial.

Opinion of the Review Panel

Accordingly, the Review Panel agreed with and adopted the report and informed the Congress that the demand is not a legal or equitable claim against the United States and any payment on such demand would be a gratuity.

T. H. Egley, pro se.

Thomas W. Petersen, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before WHITE, *Presiding Commissioner of the Review Panel*, SCHWARTZ and WIESE, *Commissioners.*

BY THE REVIEW PANEL: House Resolution 943, 92d Cong., 2d Sess., which was adopted on August 15, 1972, referred H.R. 3462, "A bill for the relief of Seaview Electric Company," to the Chief Commissioner of the Court of Claims pursuant to 28 U.S.C. §§ 1492 and 2509, "for further proceedings in accordance with applicable law."

A petition was filed here on September 14, 1972, by T. H. Egley, who stated that he was the successor in interest to Seaview Electric Company. It was indicated in the petition that a claim for relief was being asserted in connection with a contract between Seaview Electric Company and the United States, which had been terminated by the Government. The crucial allegations in the petition were to the effect "that certain unfair, improper, and discriminatory acts of the Contracting Officer [such acts were not otherwise specified in the petition] led eventually to the bankruptcy of Seaview," and that "An arbitrary imposition of liquidated damages of over $100,000, prevented Seaview from obtaining new contracts while being low bidder on advertized solicitations."

Following the filing of the petition, the Chief Commissioner assigned the matter to Trial Commissioner Kenneth R. Harkins for the conduct of proceedings pursuant to 28 U.S.C. § 2509(c) and the rules promulgated by the Chief Commissioner.

On January 29, 1975, Trial Commissioner Harkins filed a report, consisting of an opinion, findings of fact, and a con-

clusion which stated in part that "Seaview Electric Company and its successors in interest do not have a legal claim or an equitable claim," and that "Any payment pursuant to * * * H.R. 3462 would be a gratuity."

Mr. Egley on May 5, 1975, filed exceptions to Trial Commissioner Harkins' report; the defendant responded to the exceptions on September 22, 1975; and, after additional proceedings before the Review Panel were concluded, Mr. Egley and defendant's counsel presented oral arguments to the Review Panel on March 4, 1976.

Mr. Egley's exceptions to Trial Commissioner Harkins' report consist, basically, of two contentions, which will be discussed in some detail.

The Disqualification Contention

Mr. Egley's first contention is that Trial Commissioner Harkins should have disqualified himself because: (1) he indicated at a comparatively early stage of the proceeding at the trial level that he had prejudged the case; and (2) he was a member of the professional staff of the House Judiciary Committee at a time when Mr. Egley was discussing with personnel of that committee the possibility of securing the introduction of a bill for the relief of Seaview Electric Company.

This matter was assigned to Trial Commissioner Harkins on September 15, 1972, and he was thereafter in charge of the proceeding until January 29, 1975, when his report was filed. During the intervening period, Trial Commissioner Harkins held five pretrial conferences with Mr. Egley and counsel for the Government.

At the pretrial conference of October 11, 1973, Trial Judge Harkins informed Mr. Egley that the submission which the latter had made pursuant to a pretrial order directing the parties to outline the documentary evidence and the oral testimony of witnesses on which they expected to rely "was incomplete and that the materials submitted thus far did not set forth in sufficient detail either the factual issues or plaintiff's theory of his case."

Subsequently, at the pretrial conference of January 23, 1974, Trial Commissioner Harkins indicated that the pretrial data which Mr. Egley had submitted up to that time were insufficient to delineate the nature of the plaintiff's claim, and that "on the basis of the information that has been supplied to date, the only recommendation that could be made to Congress at this time would be that any payment to plaintiff would be in the nature of a gratuity."

Then, at the pretrial conference of March 20, 1974, Trial Commissioner Harkins emphasized "that plaintiff was required to show the factual basis for his claim and that such showing had not as yet been made."

The Review Panel does not construe Trial Commissioner Harkins' remarks as indicating that he had prejudged the case because of prejudice against the plaintiff or bias in favor of the Government. Rather, it appears that he was motivated by a commendable desire to provide guidance for a nonlawyer plaintiff as to what the latter would have to do in order to justify a favorable report to the Congress.

As for Trial Commissioner Harkins' former membership on the professional staff of the House Judiciary Committee, there is nothing to indicate that, while occupying such position, he had any connection with, or knowledge of, Mr. Egley's efforts to obtain the introduction of a bill for the relief of Seaview Electric Company. Furthermore, Mr. Egley's efforts before the House Judiciary Committee were successful, and the result was H.R. 3462, 92d Congress.

The Review Panel does not find in the record any basis on which Trial Commissioner Harkins should have disqualified himself from handling this matter at the trial level.

In addition, it should be noted that Mr. Egley never attempted to secure the removal of Trial Commissioner Harkins from the proceeding—as Mr. Egley was entitled to do under Rule 14(d)—and, indeed, did not express any dissatisfaction with Trial Commissioner Harkins until after the latter had filed his report unfavorable to the plaintiff. Thus, from the strictly technical standpoint, Mr. Egley waived his right to object to the qualifications of Trial Commissioner Harkins.

Opinion of the Review Panel

The Lack-of-Trial Contention

Mr. Egley has also excepted to Trial Commissioner Harkins' report on the ground that no trial was held prior to the preparation and filing of the report.

On January 10, 1973, Trial Commissioner Harkins issued a pretrial order which (among other things) directed the plaintiff to submit a pretrial statement listing the documents relied on by the plaintiff, stating the pertinent facts which the plaintiff believed to be undisputed and the additional facts which the plaintiff expected to prove, and listing the plaintiff's prospective witnesses, together with "a succinct statement of the issue or issues to which the testimony of each witness will relate."

The plaintiff submitted a pretrial statement, with attached documents, on March 27, 1973, and subsequently submitted a supplemental statement. The defendant also submitted a pretrial statement.

As indicated by Trial Commissioner Harkins at the pretrial conferences previously mentioned, the plaintiff's pretrial statement, as supplemented, did not disclose, with any sufficient degree of clarity, just how the plaintiff proposed to prove the general allegations in the petition that the contracting officer was guilty of unfair, improper, and discriminatory actions against Seaview Electric Company, which caused the bankruptcy of Seaview, and that an arbitrary assessment of liquidated damages against Seaview prevented it from obtaining new contracts for which it was the low bidder. Mr. Egley's outlines of what his prospective witnesses would testify about at a trial did not address the crucial issues in the case.

Faced with what seemed to the trial commissioner to be Mr. Egley's inability to cure the deficiencies in his pretrial submission, Trial Commissioner Harkins adopted the unusual procedure of preparing, on the basis of the documentary materials previously furnished to him by the parties, a set of tentative findings of fact, with gaps here and there at points where he believed additional facts were necessary. Copies of these tentative findings were served on Mr. Egley and on defendant's counsel, together with a directive that

they should severally concur in or except to each tentative finding, and that they should supplement the tentative findings by proposing additional factual data believed to be pertinent. After responses were received from the parties pursuant to Trial Commissioner Harkins' directive, he prepared and filed the report to which Mr. Egley has excepted.

It is recognized that the procedure which Trial Commissioner Harkins adopted in disposing of the proceeding at the trial level was contrary to the established mode for the handling of Congressional Reference cases. Conventional practice would have dictated that a trial be held. However, in the oral argument before the Review Panel, Mr. Egley was unable to identify any aspect of the case that could have benefited through the presentation of live testimony. Indeed, to be more exact, the oral presentation was such as to lend convincing support to the trial commissioner's conclusion that there was no proof at all of plaintiff's several contentions. Oral argument made apparent, too, that had the trial commissioner not undertaken to marshall the facts (meaning, his preparation here of proposed findings), plaintiff's case would have remained as simply a series of disjointed facts, unfocused in regard to the crucial matters in issue. Given these circumstances, it is the opinion of the Review Panel that, in this instance, the failure to hold a trial is not a sufficient reason to justify a reversal of Trial Commissioner Harkins' report and remand of the proceeding for the holding of a trial.

CONCLUSION

The Review Panel:

(1) determines that the exceptions to the trial commissioner's report are not meritorious;

(2) agrees with and adopts the opinion, findings of fact, and conclusion of the trial commissioner, which are attached hereto and made a part hereof; and

(3) informs the Congress that the demand involved in this proceeding is not a legal or equitable claim against the United States, and any payment on such demand would be a gratuity.

Syllabus

ERIEZ MAGNETICS CORPORATION v. THE UNITED STATES

[Cong. Ref. No. 7–72. Filed February 10, 1976]

REPORT TO THE UNITED STATES SENATE

Congressional reference; contracts; mistake in bid; contract reformation; unjust enrichment claim; assumption of risk for losses.—This congressional reference was referred to the Chief Commissioner of this court by S. Res. 132 (92d Cong.), pursuant to 28 U.S.C. §§ 1492 and 2509. Claimant, low bidder, entered into a fixed-price contract to manufacture three types of mail belt conveyors for the United States Post Office Department (POD). During performance, claimant sustained losses caused by errors in bid of which it alleges the POD was aware but of which POD failed fully to advise claimant and to have taken advantage of claimant by accepting and retaining conveyors at less than a fair price. Defendant had requested claimant to confirm all unit prices because the variance in claimant's bid and the bids of others suggested possibility of error; claimant promptly confirmed its bid. During contract performance claimant realized that the cost of producing the first 20 conveyors was substantially in excess of its bid and that the cause was the omission of a number of items from its bid estimate worksheets. Claimant's request for relief was denied on the merits by the POD after extensive discussions. Claimant successfully performed the contract, furnishing 614 units, and claims losses of $131,157 consisting of the difference, by reason of alleged errors, between the actual bid and the "corrected" bid or price. Plaintiff seeks contract reformation to increase the contract price, and asserts unjust enrichment of the Government and entitlement to relief on broad equitable principles. In a report consisting of an opinion, findings of fact and a conclusion, Trial Commissioner Schwartz concluded that claimant's losses were due to its own inefficiency and negligence, without fault or unconscionable conduct by the United States and not under circumstances creating a legal claim against the United States; that the claim has no merit under equitable principles, whether principles of morality or those applied in a court of equity; and that any payment to plaintiff would be a gratuity. On February 10, 1976 the Review Panel adopted the said report.

Contracts; reformation; mistake; mistake in bid.

[1] A contractor is entitled to contract reformation, to increase the contract price, where he shows a material mistake consisting of an error in his bid, of which the Government at the time the bid was accepted knew or had reason to know. If, however, the Government having reason to surmise an error, advises the contractor of the reason for its belief and requests verification, and the contractor

confirms his bid, the contractor is deemed to be at fault, bearing the risk of error, and is bound by his confirmation.

Contracts; bids; confirmation of bid, Government request for.

[2] Where the Government has called to the lowest bidder's attention a variance between his bid and those of others and suggests possibility of error, a prudent man would inquire as to how great was the variance—information publicly available from the abstract of bids—and would restudy the bid estimate. It can hardly be said that it was apparent to the Government that the low bidder had made an error when the bidder promptly wired confirmation of his bid without inquiry.

Contracts; bids; mistake; effect of.

[3] Where the Government requested the low bidder to confirm its bid, suggesting possibility of error, the bidder promptly confirmed the bid, and during contract performance the contractor realized that its costs were substantially in excess of its bid, the contractor is not entitled to relief in law or equity for the losses it sustained in completing the contract where the number of mistakes in estimating the bid was so great as to rule out any claim of mistake in arithmetic or other simple inadvertence and the record indicates that the contractor was generally inefficient, negligent and guilty of bad judgment.

Contracts; bids; mistake in bid; unjust enrichment claim.

[4] Where the contractor suffered losses in performance of a competitively bid, fixed-price contract caused by its negligence and inefficiency, expressed in multiple bidding errors and in confirming its bid which the Government had advised was suspect for error, and absent a showing that the Government took advantage of or misled the contractor either during the pre-award period or during negotiations for a price increase, a claim of unjust enrichment will not lie since under the circumstances the contractor did not provide any services or goods additional to those bargained for.

Congressional reference; equitable claim; what constitutes.

[5] The term "equitable claim," as used in 28 U.S.C. § 2509, is not used in a strict technical sense meaning a claim involving consideration of principles of right and justice as administered by courts of equity, but the broader moral sense based upon general equitable considerations. Where the contractor's losses in performing its Government contract were caused by its own multiple acts of negligence and inefficiency, such circumstances do not give rise to an "equitable" claim for compensation under moral or equitable principles, broad or otherwise.

Congressional reference; contracts; assumption of risk; contract losses.

[6] If the losses claimant sustained in performance of the subject fixed-price contract were recognized in this congressional reference,

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despite the clear language of ASPR § 3-404.2(a) providing that a fixed-price contract is not subject to any adjustment by reason of the cost experience of the contractor in performance of the contract, it would encourage other bidders to rely less on the care with which they make their bids and more on the making of claims when their errors in bidding result in losses. Equity must be done to both parties.

William C. Sennett, attorney of record, for plaintiff.

Ray Goddard, with whom was Assistant Attorney General *Carla A. Hills*, for defendant.

OPINION*

SCHWARTZ, *Trial Judge* (*Commissioner*): By S. Res. 132 of the 92nd Congress, the United States Senate on September 26, 1972, referred S. 2026, a bill for the relief of Eriez Magnetics Corporation, to the Chief Commissioner of this court for report, pursuant to 28 U.S.C. §§ 1492 and 2509 (1970), giving such findings of fact and conclusions of law as should inform the Congress whether the demand is a meritorious claim, legal or equitable, against the United States or a gratuity, and the amount, if any, legally or equitably due from the United States to the claimant. The Chief Commissioner referred the case to Trial Judge (Commissioner) David Schwartz for proceedings and report in accordance with the applicable rules and designated a three-member review panel to consider the report.

Claimant, a Pennsylvania corporation located in Erie, Pennsylvania (herein "the plaintiff"), seeks relief on account of losses incurred in 1968 in the performance of a contract to manufacture mail belt conveyors for the United States Post Office Department. Preparation of the bid and performance of the contract took place at plaintiff's Trowbridge Conveyor Division in Clifton, New Jersey, whose facilities consisted of the assets of a company acquired by plaintiff some years earlier. Following the conclusion of the instant contract, the division was closed, in 1969; the losses under the instant con-

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*The opinion, findings of fact, and conclusions are submitted under the order of reference and the Rules of the Chief Commissioner. The findings of fact are not printed here.

tract, and the poor performance of the Division's personnel in making and supervising the bid which caused the losses, were in large part the cause of the closing.

The losses were caused by plaintiff's errors in arriving at a bid in an amount far less than what turned out to be actual costs. The Post Office Department is alleged to have known or had reason to know of plaintiff's errors, to have failed fully to advise the plaintiff and to have taken advantage of the plaintiff by accepting and retaining conveyors at less than a fair price.

The contract was a fixed price contract for portable aluminum belt conveyors for use in processing mail on the loading docks of local post offices. Three different models, L–12, L–16, L–20, were specified, the difference consisting of the length of the conveyor belt.

The solicitation for bids, issued on November 27, 1967, was in two parts. Item I called for the manufacture of 173 conveyors and their delivery to designated post offices. Item II was a requirements contract for the conveyors which would be needed by the Post Office Department, estimated at 150, between the date of the award and June 30, 1969. Plaintiff bid a uniform price, $685 including freight, for each of the units under Item I, regardless of model. Under Item II, plaintiff bid $570, excluding freight, for model L–12, $630 for L–16 and $700 for L–20.

In estimating its bid, plaintiff omitted, for reasons to be discussed, a number of items, substantial and minor. Items omitted included a motor starter and related parts (though the push button for the starter was included), engineering, labor for the motor starter assembly, and overhead and mark-up for these and other parts. Other costs were substantially underestimated and such costs as special crating and manuals were omitted.

Plaintiff submitted its bid on January 3, 1968. The 13 bids received were opened on January 5, 1968, revealing plaintiff to be the low bidder. Its total bid of $214,105 for the 323 conveyors ordered by Item I and estimated in Item II was $61,073 lower than the next low bid of $275,178. Four of the remaining 11 bids ranged between $285,000 and $305,000; six between $325,000 and $500,000; and the highest was $895,000.

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January 10, 1968, the Post Office sent plaintiff a telegram requesting plaintiff to confirm all unit prices as the "variance between your bid and others recd suggests possibility of error." It was the practice of the Post Office Department to send such a telegram in cases where the variance between the two lowest bids was 15 percent or more. In this case the variance was 22 percent.

Without any restudy of its bid estimate, and on a mere recheck of the arithmetic in the estimate, plaintiff sent prompt confirmation by telegram, followed by a confirming letter dated January 12, 1968. The contract was awarded to plaintiff on February 21, 1968.

Plaintiff successfully performed the contract, furnishing 614 units—the 173 specified under Item I of the contract and 441, 291 more than the contract estimate of 150, under Item II. The total price was $405,495.

In July 1968, after manufacturing the first 20 conveyors, plaintiff made a routine cost analysis and concluded that its cost of producing these first conveyors was substantially in excess of its bid and that the cause was the omission of a number of items from its bid estimate worksheets.

After telephone calls by plaintiff's representatives to the Post Office Department in August 1968, and a preliminary letter of September 6, 1968, a formal written request for relief was presented on October 9, 1968, extensively discussed and reviewed in the Post Office Department and finally denied on the merits on December 3, 1968. Plaintiff was, however, permitted to terminate the contract at the optimum point in the light of the orders for conveyors in process of manufacture. This point was at the production of 614 units; accordingly orders placed after November 21 were not filled. Of the 614 units, orders for 459 were placed before plaintiff first notified the Post Office Department of its likely losses and bidding errors and 486 were placed before the Post Office Department received plaintiff's written request for relief on September 9, 1968.

The claimed losses of $131,157 consist of the difference, by reason of alleged errors, between the actual bid and the now "corrected" bid or price for the 614 units. The accompanying findings of fact contain a detailed analysis of the errors, the

differences and the other relevant facts in such detail as the record permits.

Plaintiff urges three theories as warranting relief: (1) reformation to increase the contract price on the ground that the Post Office Department knew or had reason to know of the bidding errors; (2) unjust enrichment of the Government; and (3) broad equitable principles.

It is found that the bid was improvidently low, not by reason of an inadvertent mistake such as anyone might commit, but rather by reason of the general inefficiency, negligence and consequent errors of plaintiff's supervisory and junior personnel involved in the bidding process; that had plaintiff not been negligent and inefficient it would have increased its bid per unit by $144.39 plus $14.44 for additional profit and nevertheless not lost its position as low bidder; that were plaintiff to show merit to the claim made in this proceeding it should recover its excess costs per unit on the 614 units (but not lost profit) of $144.39 per unit, or $88,655.46, plus the $5550 by which freight was underestimated, or $94,205.46; that the Post Office Department had no knowledge of the errors in plaintiff's bid and that the Department acquitted itself of its duties to plaintiff in respect of errors and doubts as to the bid by notifying plaintiff as it did and asking for confirmation of the bid; and that plaintiff was again inefficient and negligent in confirming its bid without consulting the abstract of bids or restudying its bidding worksheets. For the following reasons it is concluded that the plaintiff's losses were due to its own inefficiency and negligence, without fault or unconscionable conduct by the United States and not under circumstances creating a legal claim against the United States. The claim has, moreover, no merit under equitable principles, whether principles of morality or those applied in a court of equity. Any payment to plaintiff would be a gratuity, would erode the responsibility placed, in the Government's procurement system, upon the bidder in a fixed price contract for the accuracy of his bid, and would encourage unwarranted claims by bidders who had suffered losses for reasons not the fault of the Government.

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I

A contractor will be entitled to reformation, to increase the contract price, where he shows a material mistake consisting of an error in his bid, of which the Government at the time the bid was accepted knew or had reason to know. *Wender Presses, Inc.* v. *United States*, 170 Ct. Cl. 483, 485, 343 F. 2d 961, 962 (1965); *Allied Contractors, Inc.* v. *United States*, 159 Ct. Cl. 548, 549–50, 310 F. 2d 945, 945–46 (1962). If, however, the Government, having reason to surmise an error, advises the contractor of the reason for its belief and requests verification, and the contractor confirms his bid, the contractor is deemed to be at fault, bears the risk of error and is bound by his confirmation. *Chernick* v. *United States*, 178 Ct. Cl. 498, 505, 372 F. 2d 492, 496 (1967); *Alabama Shirt & Trouser Co.* v. *United States*, 121 Ct. Cl. 313, 331 (1952). See ALI, RESTATEMENT OF CONTRACTS SECOND, TENTATIVE DRAFT No. 10 (1975), §§ 295(b), 296 (b), (c), 229, comment(a), illus. 2; *Doke*, MISTAKES IN GOVERNMENT CONTRACTS, 18 S.W.L.J. 1, 32–38 (1964).

The errors here consisted of omissions of required materials and understatements of required hours of labor and overhead costs, in plaintiff's private working estimates of its costs and what should be its bid price for the three models of conveyors specified in the bid package. Major items were omitted by reason of the inexperience of the salesman assigned to do the estimate and the negligence of his more experienced and supposedly mature supervisors, responsible for reviewing and checking his estimates. The underbidding was in part influenced by the fact that plaintiff was anxious to get the business, and the competitive urge may have been part or all of the cause for the omission of lesser items such as paint, crating and technical manuals.

The Post Office Department did not have a copy of plaintiff's list of materials; it did not know how plaintiff calculated its bid. *Cf. Loral Corp.* v. *United States*, 193 Ct. Cl. 473, 480, 434 F. 2d 1328, 1331 (1970). The Department did not and could not know, from the plaintiff's bid, that plaintiff's estimator had omitted materials plainly specified in text and in drawings. *Cf. Jamsar, Inc.* v. *United States*, 194 Ct. Cl. 819, 829, 442 F. 2d 930, 935–36 (1971).

The Post Office knew only the dollar variance between plaintiff's bid and the other bids, and that plaintiff's bid was lower than the Post Office's estimate of cost. Six of the 12 bids other than plaintiff's were also below the Government's estimate. The hard fact, therefore, was the fact that plaintiff's bid of $214,105 was $61,073 or 22 percent lower than the next higher bid. The Department's practice in the case of a bid 15 percent or more lower than the next higher bid was to point out the possibility of error, and the reason, and ask for confirmation, as it did here.

In the circumstances, the telegram said all the Post Office Department could say, by pointing out that "variance between your bid and others recd suggests possibility of error." The telegram did not deceive or mislead the plaintiff. Prudent men would have inquired as to how great was the variance—information publicly available from the abstract of bids—and restudied the bid estimate. *Cf. Jamsar, Inc.* v. *United States*, *supra*, 194 Ct. Cl. at 827, 442 F. 2d at 934–35; *Hunt & Willett, Inc.* v. *United States*, 168 Ct. Cl. 256, 265, 351 F. 2d 980, 985–86 (1964). Plaintiff's employees, without any thought other than that their bid was lowest and the award was in sight, did nothing, on receipt of the telegram, but recheck the bid for arithmetical error and, finding none, promptly wired confirmation. The negligence in the original estimate of the bid was repeated. "Since plaintiff was satisfied with its bid, after checking it, it can hardly be said that it was apparent to the defendant's representatives that plaintiff had made an error." *Allied Contractors, Inc.* v. *United States*, *supra*, 159 Ct. Cl. at 551, 310 F. 2d at 946.

Though plaintiff had experience in Government contracting, all of the employees involved in reviewing the bid—manager, shop foreman, experienced supervisor and estimator—committed errors, in assigning an inexperienced young man to estimate the bid, in supplying him with erroneous data and estimates, in reviewing his work and, finally, in confirming the bid when they were put on notice of its possible error. The losses suffered were caused by plaintiff alone, by its repeated errors and acts of negligence. The estimator's errors, in omitting elements of cost, and those of his seniors in reviewing his work and in giving him an estimate of labor

costs and other elements of the bid, were so numerous as to warrant a conclusion that plaintiff "exercised 'no diligence whatever' in ascertaining the readily accessible facts" relevant to the making and confirmation of his bid. *Anderson Bros. Corp.* v. *O'Meara*, 306 F. 2d 672, 677 (C.A. 5 1962). The number of mistakes was so great as to rule out any claim of "honest mistake" in arithmetic or other simple inadvertance, such as anyone might commit. Plaintiff was not so much mistaken as generally inefficient and guilty of bad judgment, qualities for whose consequences no remedy is given either at law or equity. *Ruggiero* v. *United States*, 190 Ct. Cl. 327, 335, 420 F. 2d 709, 713 (1970); *Alabama Shirt & Trouser Co.* v. *United States*, *supra*.

II

Nor is there any ground for a claim of unjust enrichment of the Government or unconscionable conduct by its representatives.

The contract was clear that Item II was a requirements contract by which the successful bidder would agree to furnish, at the prices bid, all conveyors needed by the Government until June 30, 1969, more than 18 months distant from the solicitation. The contract estimate of the number needed before that date was clearly only an estimate. There was no showing that this estimate was unreasonable when made. The Post Office thus bargained for and received the conveyors under a fixed price contract, paying the contract price. Plaintiff did not provide any additional unbargained-for services or goods.

Plaintiff's unilateral mistakes and its failure to discover its errors prior to contract award were not caused by any act or omission of the defendant. The Government took no advantage of plaintiff either during the pre-award period, as seen above, or during the negotiations for a price increase.

In considering plaintiff's request for relief, the Post Office Department did not mislead plaintiff, gave no assurances that plaintiff would receive a price increase or be compensated for any loss, and urged plaintiff to perform the contract while it conscientiously explored the possibility of lawful relief (and found none). Plaintiff's continued

performance, while its request for relief was pending, was no more than was required by the contract.

There was here no mutual mistake, no wrongful act or omission by the Government contributing to plaintiff's mistakes. *Schutt Construction Co.* v. *United States*, 173 Ct. Cl. 836, 353 F. 2d 1018 (1965); *National Presto Industries, Inc.* v. *United States*, 167 Ct. Cl. 749, 338 F. 2d 99 (1964); *Rochester Iron & Metal Co.* v. *United States*, 168 Ct. Cl. 422, 339 F. 2d 640 (1964). And no benefit was gotten by the Government beyond what it had bargained for and plaintiff was properly obligated to supply. *Palmer-Bee Co.* v. *United States*, 142 Ct. Cl. 485, 489–90 (1958); *Clavier* v. *United States*, 139 Ct. Cl. 98, 112, 153 F. Supp. 451, 458 (1957).

The circumstances offer no ground for a decision which would shift from the contractor to the Government the losses suffered by the contractor in the performance of a competitively bid, fixed price contract, losses caused solely by the contractor's negligence and inefficiency, expressed in multiple bidding errors and in confirming a bid which the Government had advised was suspect for error. The case presented is in reality no more than one of losses from an improvident bid. Such a case is as much without merit as one for losses from inefficient performance. *Federal Electric Corp.* v. *United States*, 202 Ct. Cl. 1028, 1032, 486 F. 2d 1377, 1379 (1973), *cert. denied*, 419 U.S. 874 (1974); *Bentley* v. *United States*, 189 Ct. Cl. 547, 552–53 (1969); *Hellander* v. *United States*, 147 Ct. Cl. 550, 562, 178 F. Supp. 932, 939 (1959).

III

Lastly, there is no merit to the contention that recovery may be based upon "broad equitable principles" said to be applicable to such a case as this. While the parties differ on the breadth of the standard, in a Congressional Reference case, for the approval of a claim as equitably meritorious, they both approve of *Burkhardt* v. *United States*, 113 Ct. Cl. 658, 667, 84 F. Supp. 553, 559 (1949), in which it was said that "the term 'equitable claim', as used in 28 U.S.C., Sec. 2509, is not used in a strict technical sense meaning a claim involving consideration of principles of right and justice

as administered by courts of equity, but the broader moral sense based upon general equitable considerations."

Whatever the subtly different tests advocated, and by either standard espoused,[1] the facts of this case do not give rise to an "equitable" claim for compensation under moral or equitable principles, broad or otherwise. Plaintiff's losses were caused by its own multiple acts of negligence and inefficiency.

Plaintiff had a complete and accurate bid package before it, in estimating its bid. It was negligent in assigning inexperienced or inefficient personnel to the job. On the bid opening, the abstract of all the bids became available to plaintiff. The variance between plaintiff's and the other bids as suggesting possibility of an error in bidding was explicitly brought to plaintiff's attention. Had plaintiff acted reasonably, it would have made inquiries of the Post Office Department as to the other bids, consulted the bid abstract and then subjected its bid estimate to the careful study it should have had in the first place. Instead, plaintiff's representatives merely rechecked the arithmetic in the bid estimate and took no action even after the bid abstract became available to it, before the award. In these circumstances, the defendant did all that could be expected of it, and the plaintiff caused its own losses, by its multiple acts of negligence and by its inefficiency.

One final consideration is the effect on the Government's procurement system were plaintiff's claim to be recognized. The competitive bidding system by which fixed price contracts are awarded is understood to place full responsibility on the successful bidder for maintaining his agreed fixed bid

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[1] Defendant urges that "the defendant's liability must rest on some unjustified act or omission to act which caused plaintiff's damage. * * * Put otherwise, it has been said that the test of 'equity' is whether the claim asserted would be recoverable against a private party." *Webb* v. *United States*, 192 Ct. Cl. 925, 932 (1970); see also *Burt* v. *United States*, 199 Ct. Cl. 897, 906 (1972).

Plaintiff urges, to the contrary, that "circumstances * * * sufficient to establish plaintiff's 'equitable' position under the concept set forth in the *Burkhardt* case, *supra*," may exist though the "plaintiff's errors were not attributable to any action of the Government" (*Rumley* v. *United States*, 169 Ct. Cl. 100, 108 (1965)) and that a plaintiff may recover if "the conscience and honor of the sovereign dictate that plaintiff[s] should receive compensation * * *." *Ghitescu* v. *United States*, *supra*, 201 Ct. Cl. 823, 828, quoting from *Drake America Corp.* v. *United States*, 168 Ct. Cl. 318, 326 (1964).

price. He knowingly assumes the risk that his costs will exceed his bid, in return for the promise of profit from the difference between bid and costs. The very definition of the fixed price contract provides that it is "not subject to any adjustment by reason of the cost experience of the contractor, in the performance of the contract." ASPR 3-404.2(a), 32 CFR § 3.404-2(a) (1974); *cf.* FPR 1.3-404.2(a), 41 CFR § 1-3.404-2(a) (1974). If the instant claim for losses on such a contract were recognized, it would surely encourage other bidders to rely less on the care with which they make their bids and more on the making of claims when their errors in bidding result in losses.

Equity must be done to both parties. Equity for the Government, for its system of procurement and for all the bidders who are held to their contracts points in this case only to a decision that the risk of error and loss be borne by the contractor who assumed it, as this plaintiff did when it ignored the opportunity, presented by the Government's telegram, to discover its errors. *Loral Corp.* v. *United States*, *supra*, 193 Ct. Cl. at 480, 434 F. 2d at 1331; *Rochester Iron & Metal Co.* v. *United States*, *supra*, 168 Ct. Cl. at 426-27, 339 F. 2d at 643; ALI, RESTATEMENT OF CONTRACTS SECOND, TENTATIVE DRAFT No. 10, *supra*.

For the reasons stated it is concluded that plaintiff has neither a legal nor an equitable claim against the United States for the losses incurred in the performance of the contract, and, moreover, that broad equitable principles do not warrant any relief. Any payment to plaintiff would be a gratuity.

The opinion, findings of fact and conclusion will be certified by the Clerk to the Senate pursuant to its resolution of reference.

CONCLUSION

The Congress is advised that the plaintiff has neither a legal nor an equitable claim against the United States and that any payment to plaintiff would be a gratuity.

ORDERS

No. 183–74. FEBRUARY 6, 1976

Walter J. Smith, Jr.

Civilian pay; dismissal; laches; prejudice.—On February 6, 1976 the court issued the following order:

Before SKELTON, *Judge*, Presiding, NICHOLS and BENNETT, *Judges.*

"This civilian adverse action case is before the court on plaintiff's motion for summary judgment and defendant's response and cross-motion for summary judgment. Plaintiff on September 16, 1969, was advised by N. B. Coon, Assistant Director for Administration of the Bureau of Narcotics and Dangerous Drugs (BNDD), that it was proposed he be removed from his position as a Supervisory Criminal Investigator, GS–14, in the Denver Regional Office, because of plaintiff's alleged misuse of his official position for personal financial gain, in six separate specifications involving sale of narcotics and illegal division of monies Bureau agents had found in searching premises, and for misrepresentation of facts in the signing of certain statements believed to be tracings by the FBI. Plaintiff was advised of his right to oral and written reply. The essential facts are not in dispute. Plaintiff replied in writing and asked for a hearing.

"One Joseph L. Dwyer, a trial attorney in the Antitrust Division of the Department of Justice, was designated to conduct a pre-termination hearing which was held for 3 days at Denver in December 1969. On May 22, 1970, Mr. Dwyer's report recommended, without reaching the merits, that the proceedings against plaintiff were fatally defective because plaintiff had not been given opportunity to cross-examine adversary witnesses whose testimony was presented by sworn affidavit. Two witnesses did testify directly, however. The hearing officer also objected that the appeals file should have

included reports of the investigation of plaintiff and a list of the Bureau's witnesses and the affidavits on which the agency would rely—all being made available to plaintiff before the hearing. He also ruled that the burden of making available witnesses adversary to plaintiff fell upon the Bureau.

"On June 3, 1970, Mr. Coon considered the record and rejected the conclusions of the hearing officer. Mr. Coon concluded that the charges against plaintiff were fully supported by the evidence and warranted his removal, which was effected on June 12, 1970. Plaintiff's job was then abolished.

"An appeal to the Director of the Bureau was made and the Director, on August 26, 1970, upon consideration of the whole record made to date, affirmed Mr. Coon's decision to remove plaintiff who then appealed to the Civil Service Commission's Denver Regional Office. On February 5, 1971, the Regional Civil Service Commission Office ruled that there were no violations of any regulatory requirements in the manner in which the hearing had been arranged or held and that the charges and specifications against plaintiff were sustained by the evidence of record and that his removal was for such cause as promoted the efficiency of the service. Plaintiff was accorded a *de novo* hearing before an appeals examiner of the CSC Denver Regional Office. On October 29, 1971, the Commission's Board of Appeals and Review (BAR), in a lengthy opinion, sustained plaintiff's removal and the decision of its Regional Office. It found, among other things, that testimony of two witnesses supported five of the six specifications under Charge 1. This suit followed on May 24, 1974—31 months later.

"The motions present the court with four principal issues: (1) Whether the claim is barred by the doctrine of laches; (2) whether the removal action complied with all procedural requirements; (3) whether the hearing afforded plaintiff before the CSC Regional Office rendered harmless any technical deficiencies in the pre-termination agency hearing; and (4) whether loss of the administrative record in this case affects the outcome.

"Defendant asserts the equitable doctrine of laches as a defense, claiming that plaintiff did not act with due diligence in bringing suit, his failure was without good excuse, and the

delay has prejudiced defendant. One of the witnesses who testified at the pre-termination hearing has died and the record has been lost. Also, if plaintiff wins, defendant points out that it will have to give him back pay for the period since June 1970 when plaintiff's job was abolished and covering a period when he had performed no service. Plaintiff's claim is indeed stale if his delay is without extenuating circumstances. Plaintiff says that in February 1972 he sought copies of a BNDD response, a copy of the CSC Regional Office investigator's report, a copy of the agency hearing transcript, and a complete copy of the record for his review. He was advised that these materials were in Washington but in May 1972 they were sent to Denver for his inspection at the CSC Regional Office. Plaintiff did not show up to examine the papers until November 1972 by which time they had been returned to Washington. But, in December 1972, the file was back in Denver for plaintiff's inspection. He says it was then incomplete. He then waited 9 months, until September 18, 1973, to request certain documents from BAR which he had seen in examining the file in Denver. Plaintiff was told on October 1, 1973, that he could have any duplicate copies of the file, and others, for a fair fee. We are not impressed by these dilatory efforts. Nothing prevented plaintiff from bringing suit and resorting, if necessary, to the court's discovery procedures to obtain whatever he wanted to see. Now some of the administrative record has been misplaced. But, it was made available to plaintiff for review at least 17 months before bringing suit. We think that this delay was all unnecessary and that defendant has clearly shown to be prejudiced by it. This bars the claim. We do not apply laches as a bar except in cases where the prejudice to defendant is clearly manifested by delay unexplained by extenuating circumstances. The extent of the delay depends on the facts of the case, as does the prejudice. The 31-month delay occasioned here is within the range of other cases where laches has been applied for approximately the same or less periods of time. *Cf. Norris* v. *United States*, 257 U.S. 77 (1921), 11 months; *Arant* v. *Lane*, 249 U.S. 367, 372 (1919), 20 months; *Brown* v. *United States*, 418 F. 2d 442 (5th Cir. 1969), 28 months; *Corrington* v. *Webb*, 375 F. 2d 298 (9th Cir.), *cert.*

denied, 389 U.S. 930 (1967), 34 months; *Grasse* v. *Snyder*, 192 F. 2d 35 (D.C. Cir. 1951), 16 months; *Coughlin* v. *Ryder*, 260 F. Supp. 256 (E.D. Pa. 1966), 24 months; *Wilmot* v. *United States*, 205 Ct. Cl. 666, 684 (1974), 39 months; *Bovard* v. *United States*, 160 Ct. Cl. 619, *cert. denied*, 374 U.S. 830 (1963), 14 months; *Henry* v. *United States*, 139 Ct. Cl. 362, 153 F. Supp. 285 (1957), 48 months; *Morse* v. *United States*, 59 Ct. Cl. 139 (1924), *appeal dismissed*, 270 U.S. 151 (1926), 14 months. In *Brundage* v. *United States*, 205 Ct. Cl. 502, 504 F. 2d 1382 (1974), *rehearing denied*, Jan. 10, 1975, *cert. denied*, 421 U.S. 998 (1975), the court rejected as an excuse for a delay of 3 years and 8 months plaintiff's claim that he needed the time to find an attorney and to obtain documentary material considered necessary for the prosecution of his case.

"Because of the foregoing, it is unnecessary to reach any of the other issues raised by the parties.

"IT IS THEREFORE ORDERED, upon consideration of the pleadings, the motions for summary judgment and all supporting papers thereto, and upon oral argument, that plaintiff's motion for summary judgment be and it is hereby denied. Defendant's cross-motion for summary judgment is granted. The petition is dismissed."

No. 234–75. FEBRUARY 6, 1976

George A. Dounias

Civilian pay; resignation; voluntariness.—On February 6, 1976 the court issued the following order:

Before DAVIS, *Judge, Presiding*, NICHOLS and KASHIWA, *Judges.*

"This case comes before the court on defendant's motion, filed October 14, 1975, to dismiss plaintiff's petition or, in the alternative, for an order remanding the case back to the Civil Service Commission and on plaintiff's motion, filed November 19, 1975, for leave to file a cross-motion for summary judgment, having been considered without oral argument.

"Plaintiff resigned from his position before his termination became effective and does not allege or offer to show facts or circumstances sufficient to raise a triable or disputable issue as to the involuntariness of the resignation. A mere conclusory allegation of "involuntariness" is not sufficient. *See Leone* v. *United States*, 204 Ct. Cl. 334, 340–41 (1974); *Christie* v. *United States*, 207 Ct. Cl. 333, 338, 518 F. 2d 584, 587–88 (1975), (and cases cited in both decisions). The court has also taken account of the assertions at pp. 14–19 of plaintiff's cross-motion for summary judgment (which plaintiff has moved for leave to file) but considers them inadequate to show anything more than that plaintiff voluntarily made up his own mind to resign after receiving advice from a superior that that would be the better course. The resignation must therefore be considered voluntary and, accordingly, plaintiff has no right to attack the proceedings for his separation. In view of this conclusion, which necessarily results in the granting of defendant's motion to dismiss and in the dismissal of the petition, it is unnecessary for the court to decide whether to grant plaintiff leave to file his untimely motion for summary judgment.

"IT IS THEREFORE ORDERED that defendant's motion to dismiss plaintiff's petition is granted and the petition is dismissed."

No. 270–75. FEBRUARY 6, 1976

Nanno Schoenthal

Military pay; limitation of actions; discharge.—Plaintiff, a former member of the United States Army, received an honorable discharge on May 23, 1969. Plaintiff's appeal for relief to the Army Board for Correction of Military Records was denied July 23, 1970. Plaintiff's petition in this court was filed July 28, 1975. On February 6, 1976 the court issued the following order:

Before DAVIS, *Judge*, *Presiding*, NICHOLS and KASHIWA, *Judges*.

"This case comes before the court on defendant's motion, filed September 23, 1975, to dismiss the petition. Upon consideration thereof, together with the opposition thereto, with-

out oral argument, it is concluded that plaintiff's alleged claim is barred on the ground of the statute of limitations [See 28 U.S.C. § 2501; *Mathis* v. *United States*, 183 Ct. Cl. 145, 391 F. 2d 938 (1968), and *Kirby* v. *United States*, 201 Ct. Cl. 527 (1973), *cert. denied*, 417 U.S. 919 (1974)] and that plaintiff has failed to show that he was misled to his detriment as to the statute of limitations by the Government's actions in defending against his prior suit in the Western District of Pennsylvania.

"IT IS THEREFORE ORDERED that defendant's motion to dismiss the petition be and the same is granted and the petition is dismissed."

No. 291–75. FEBRUARY 6, 1976

Florence Muehlen

Court of Claims jurisdiction; failure of Government to provide garnishment remedy against federal employees.— Plaintiff, the former wife of a civilian federal employee, was granted a decree of divorce and was awarded monthly support payments and monthly payments as a property award. The petition alleges that the former husband has refused to pay the sums and that the agency has refused to aid plaintiff in her attempts to enforce the judgments against her husband. On February 6, 1976 the court issued the following order:

Before DAVIS, *Judge, Presiding*, NICHOLS and KASHIWA, *Judges*.

"This case comes before the court on defendant's motion, filed October 2, 1975, to dismiss plaintiff's petition. Upon consideration thereof, together with the opposition in response thereto, without oral argument, it is concluded that plaintiff is not entitled to recover on the following grounds:

"(a) Even if there were violations of the Due Process and Equal Protection clauses of the Fifth Amendment, this court would not have jurisdiction of plaintiff's claim for monetary damages under those constitutional provisions. *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl. 599, 372 F. 2d 1002 (1967).

"(b) Plaintiff does not have a claim under the Just Compensation clause of the Fifth Amendment since the failure to

provide a garnishment remedy against federal employees is not a taking of private property for public use.

"(c) There are, in any event, no violations of the Due Process and Equal Protection clauses in the failure to provide a garnishment remedy against plaintiff's debtor. Congress has the broadest discretion in deciding whether and in what circumstances to permit garnishment against federal employees. *See F.H.A.* v. *Burr*, 309 U.S. 242, 249 (1940).

"IT IS THEREFORE ORDERED that defendant's motion to dismiss the petition is granted and the petition is dismissed."

No. 512–71. FEBRUARY 13, 1976

Leonard Hetson, et al., Executors of the Estate of Isidor Hetson

Taxes; estate tax; inclusions in gross estate; transfers in contemplation of death; pension payments receivable by widow under agreement with closely-held family corporation; bequests to widow; marital deduction; fair market value of stock.—This is a suit for refund of Federal estate taxes alleged to have been erroneously assessed and collected from taxpayer. The factual issues of the case relate to the amount, type and valuation of stock in a closely-held family corporation owned by decedent at the time of his death, and whether gifts of stock by decedent to his two sons within 3 years prior to death were gifts made in contemplation of that event and hence includable in the estate for tax purposes. The legal issues concern, in addition to certain aspects of the gifts-in-contemplation-of-death problem, the includability in the gross estate for tax purposes of the commuted fair market value of an annuity payable by the corporation under the terms of an agreement to decedent's widow and the proper computation of a marital deduction. In a recommended decision filed September 16, 1975 (reported in full at 36 AFTR 2d 75–6505 and at 75–2 USTC para. 13,098), Trial Judge C. Murray Bernhardt concluded that the commuted value of the widow's annuity was includable in decedent's gross estate; determined the fair market value of the stock at decedent's death; and concluded that the gifts of stock to his sons were

made in contemplation of death, and that a legacy in trust for decedent's grandchildren does not qualify for the marital deduction from the gross estate. On February 13, 1976 the court entered the following order:

Before COWEN, *Chief Judge*, KUNZIG and BENNETT, *Judges*.

"This case comes before the court on defendant's motion, filed October 24, 1975, for judgment, moving that the court adopt as the basis for its judgment in this case the recommended decision, filed September 16, 1975, by Trial Judge C. Murray Bernhardt, pursuant to Rule 134(h). Upon consideration thereof, without oral argument, it appears that on October 15, 1975, plaintiffs filed a notice of intention to except to the trial judge's recommended decision but, by letter of October 20, 1975, addressed to the Clerk of this court, plaintiffs' attorney of record asserted that he had been 'instructed by the executors of the Estate of Isidor Hetson not to proceed with an appeal from Judge Bernhardt's findings of fact and opinion' and that it is 'therefore requested that the plaintiffs' Notice of Intention to Except be withdrawn'. Under date of October 23, 1975, the Clerk of this court received a letter from Leonard Hetson, Executor, stating that, as Executor, he did not wish to discontinue the right to proceed to appeal from Judge Bernhardt's findings, that there had been a disagreement with counsel in this regard and requesting the court's indulgence until other legal counsel could be obtained. Under date of October 29, 1975, the Clerk responded, making reference to Rule 203(c) of the court's rules, noting that plaintiffs had 35 days from October 24, 1975, to respond to defendant's motion for judgment and stating that absent any response within that period defendant's motion for judgment would be presented to the court for action as an unopposed matter. No response has been received. Accordingly, since the court agrees with the trial judge's recommended decision, copies of which have been furnished to the parties it hereby grants defendant's motion of October 24, 1975, and adopts the said decision as the basis for its judgment in this case.

"IT IS THEREFORE CONCLUDED AND ORDERED that plaintiffs are not entitled to recover on their petition, that defendant is entitled to recover on its counterclaims, on which judgment

is entered for defendant, and that the case is remanded to the trial judge to determine under Rule 131(c)(2) the extent of defendant's recovery with ultimate dismissal of plaintiffs' petition to be made in later proceedings."

On March 12, 1976 the court, by order, entered judgment for defendant on its counterclaim in the sum of $264.77, plus interest according to law.

No. 869–71. FEBRUARY 13, 1976 and JULY 30, 1976

Olivia Simmons

Civilian pay; Civil Service Retirement; widow's survivor annuity; "employee" of Federal Government.—On February 13, 1976 the court issued the following order:

Before COWEN, *Chief Judge*, KUNZIG, and BENNETT, *Judges.*

"This case comes before the court on the parties' cross-motions for summary judgment. Plaintiff, Olivia Simmons, claims she is entitled to survivor's benefits as the widow of a deceased Government employee. *See* 5 U.S.C. § 8341(d). Defendant, however, maintains that plaintiff is not entitled to survivor's benefits because the deceased was retired from Government service and had elected at the time of his retirement to receive an annuity without survivor's benefits. *See* 5 U.S.C. § 8341(b). Upon consideration of the parties' motions and briefs, and the stipulated facts, the court finds as follows:

"(1) The deceased, Willie Simmons, had been employed as a Warehouseman (WB–5) by the Department of the Army, A. G. Publication Center Storage Division, Ft. Holabird, Maryland. On October 25, 1968, he was placed on leave without pay. Shortly thereafter, on November 13, the deceased applied for disability retirement using Standard Form 2801 (Application for Retirement). On his application, Simmons described himself as married but separated, and specifically selected a retirement annuity which did not entitle his wife to survivor's benefits after his death.

"(2) On January 20, 1969, Willie Simmons died of congestive heart failure. On that same date, learning of Mr. Simmons' death and not having completed the processing of his request for disability retirement, the employing agency can-

celled his application. Ten days later the agency issued a Standard Form 50 (Notification of Personnel Action), Standard Form 52 (Request for Personnel Action), Standard Form 56 (Agency Certification of Insurance Status—Federal Employees Group Life Insurance Program), and a Standard Form 2810 (Notice of Change in Health Benefits Enrollment). All listed death as the reason for Simmons' separation from service.

"(3) Plaintiff's application for death benefits was filed on February 5, 1969. On March 7, 1969, the Civil Service Commission (CSC) Bureau of Retirement, Insurance, and Occupational Health (BRIOH) requested Standard Form 2806 (Individual Retirement Record) from the Finance and Accounting Office at Fort Holabird and noted 'If Mr. Simmons applied for disability retirement submit application with SF 2806.' The deceased's retirement application was received by the CSC sometime between May 12 and June 2, 1969. On June 6, 1969, BRIOH approved the deceased's disability retirement application, made the allowances 'permanent,' and set the date for commencement of his life annuity as October 25, 1968.

"(4) Sometime prior to June 30, 1969, an application for death benefits was filed by Louise M. Simmons, a sister-in-law of Willie Simmons, on behalf of his two sons, Willie Nathaniel Simmons and Donald Lewis Simmons. This application was followed by another, on July 3, from Ellon Louise Simmons, a daughter of the deceased. The mother of all three children is the sister-in-law, Louise Simmons, whose relationship with Willie Simmons began in 1947 while she was married to but separated from Willie's brother.[1] The children have at all times been recognized by Willie Simmons as his children and were designated as equal beneficiaries of any lump-sum benefits payable after his death under the Civil Service Retirement Act. It was in their capacity as his designated beneficiaries that the children's applications for death benefits were filed.

"(5) The CSC acted first on plaintiff's application, rejecting it on August 27, 1969, on the grounds that 'Mr. Simmons

[1] At that time, Willie Simmons was married to a Mary Simpkins, who died on November 7, 1960. Mr. Simmons married plaintiff on February 19, 1964.

elected to receive an annuity which was payable during his lifetime only. He did not elect a reduced annuity with benefit to his surviving widow.' Ellon Simmons' application was then approved and on September 9, 1969, a check for $2,111.60 was issued to her in final settlement of her claim.

"(6) Plaintiff protested the rejection of her application on the ground that her husband had not received any annuity payments prior to his death. On December 4, 1969, BRIOH affirmed its prior decision, noting that '[t]he fact that all administrative actions had not been completed or that no payments had commenced did not affect the decedent's status as an annuitant at time of death. His election of plan of annuity and designation of beneficiary both became operative upon Mr. Simmons' death.'

"(7) Plaintiff's petition was filed in this court on December 17, 1971. The Government has filed a cross claim against Ellon Simmons alleging that if plaintiff is successful in her suit, Ellon Simmons is liable to the Government for the $2,111.60 paid her, but that aspect of the case is not before the court at this time.

"Plaintiff's entitlement to a survivor's annuity turns on whether her husband was retired from the Government for disability at the time of his death. If he was, then the application he made to accept an annuity without survivor's benefits effectively precludes plaintiff from receiving a survivor's annuity. *See* 5 U.S.C. § 8341(b). On the other hand, if Simmons was still an employee of the Government at the time of his death, then plaintiff is entitled to an annuity under the provisions of 5 U.S.C. § 8341(d).

"The term 'employee' is defined, for purposes of the Civil Service Retirement Act as

> [A]n officer and an individual who is—
>
> (1) appointed in the civil service by one of the following acting in an official capacity—
>
> (A) the President;
>
> (B) A Member or Members of Congress, or the Congress;
>
> (C) a member of a uniformed service;
>
> (D) an individual who is an employee under this section;
>
> * * * * *

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and
(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position. [5 U.S.C. § 2105(a)] [2]

Defendant contends that since Willie Simmons was on leave without pay at the time of his death, he was not subject to supervision, not engaged in the performance of a Federal function and, therefore, not an 'employee' within the meaning of 5 U.S.C. § 2105(a). Defendant, instead, would have the court hold that Simmons 'retired' from the Government when he submitted his application for retirement and, thus, was retired at the time of his death.

"The court is unwilling, however, to place such a strict interpretation on the meaning of 'employee' and to hold that under the facts of this case, Simmons was retired for disability at the time of his death. Although he received no compensation from the Government after October 24, 1968, he was still in an authorized leave status and occupied a Government position at the time of his death. Under defendant's view, every individual who goes on leave without pay ceases to be an employee of the Government. Obviously, such an interpretation of section 2105(a) would be erroneous. Accordingly, the court finds that although Simmons had submitted an application for disability retirement and was on leave without pay, he was nonetheless an 'employee' of the Government at the time of his death.

"Defendant contends that in *Sonnabend* v. *United States*, 146 Ct. Cl. 622, 175 F. Supp. 150 (1959), this court resolved the same issue that is present in this case by looking at the intent of the employee. In that case, an IRS employee, Henry Sonnabend, was involuntarily separated from his Government position after more than 25 years of service. By law, Mr. Sonnabend was entitled to an immediate life annuity; however, if he so desired, he could elect to accept a reduced annuity so that his wife would be eligible for a survivor's

[2] The definition of "employee" found in section 2105(a) is made applicable to the Civil Service Retirement Act by 5 U.S.C. § 8311(1)(A).

annuity after his death. Before he could file an application electing a reduced annuity, but after he had made clear his intention to do so, Mr. Sonnabend died of a heart attack. Shortly thereafter, his wife applied for a survivor's annuity, but her application was denied. She then brought suit in this court. Under the statute then in force, an individual did not have to apply in writing for a reduced annuity. All that was required was 'satisfactory evidence' of his intent. *See* Civil Service Retirement Act of 1930, ch. 349, § 13, 46 Stat. 477. The court held that, under the circumstances, the wife was entitled to an annuity because the evidence of Mr. Sonnabend's intent to accept a reduced annuity with survivor's benefits was 'so overwhelming as to convince and satisfy anyone except a doubting Thomas.' 146 Ct. Cl. at 627, 175 F. Supp. at 152.

"In this case, unlike *Sonnabend*, the evidence is uncontroverted that at the time of his death Mr. Simmons had not been separated from the Government. Thus, by operation of law without regard to Willie Simmons' intent, section 8341(d) entitles plaintiff to a survivor's annuity. If Mr. Simmons had been officially retired and separated from the Government, it is clear that the approval of his application to receive an annuity without survivor's benefits would effectively preclude plaintiff from recovering in this case. *See* 5 U.S.C. § 8341(b). However, since Simmons' application had not been approved by the CSC at the time of his death and was cancelled by the employing agency before it was approved, his election had not become operative. Accordingly, we conclude that plaintiff is entitled to recover.

"Defendant's motion for summary judgment is denied; plaintiff's cross-motion is granted, and the case is remanded to the trial judge to determine the amount of the recovery."

On July 30, 1976 the court entered judgment for plaintiff in the sum of $14,815.33 for the period from January 21, 1969 through May 31, 1976, with monthly annuity payments thereafter to be paid pursuant to law by the Civil Service Commission; dismissed defendant's cross-claim against Ellon L. Simmons, and ordered that in view of the failure of Louise Simmons, Willie Nathaniel Simmons and Donald

Lewis Simmons to appear and defend or assert their interests, if any, after being duly served with notice, they are deemed to have waived any such interests.

No. 50–74. FEBRUARY 13, 1976

Charles H. Haight, Jr.

Contracts; authority of Government agent.—On February 13, 1976 the court issued the following order:

Before COWEN, *Chief Judge*, KUNZIG and BENNETT, *Judges*.

"This case comes before the court on defendant's motion for summary judgment, filed April 4, 1975, and the opposition thereto. Plaintiff's petition alleges three separate causes of action, each based upon a separate oral contract purportedly made between plaintiff and defendant acting through various agents of the United States Government who implied their authority to make the contracts. Pursuant to each contract plaintiff was to provide certain hazardous services to defendant as an informant in the detection of criminal activity and recovery of contraband. He alleges entitlement to compensation and reimbursement of expenses in the total sum of $1,413.770, plus costs. Defendant has filed together with its motion for summary judgment and reply to plaintiff's opposition 52 exhibits, including affidavits and documentary evidence, which clearly demonstrate that the Federal employees with whom plaintiff dealt were not invested with actual authority to bind the Government in the manner alleged.

"Plaintiff's opposition and the affidavits and other papers annexed thereto do not controvert defendant's submissions insofar as they demonstrate the absence of actual authority on the part of the Government personnel referred to in the petition. One who purports to contract with the United States assumes the risk that the official with whom he deals is clothed with actual authority to enter the contract alleged. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947). A plaintiff may not recover where he fails to discharge the burden of showing the actual authority of the agents upon whose state-

ments he relied. *Housing Corp. of America* v. *United States*, 199 Ct. Cl. 705, 468 F. 2d 922 (1972). Recently we applied this rule in the case of a plaintiff claiming a reward for services as an undercover agent for the Bureau of Narcotics and Dangerous Drugs. *Hughes* v. *United States*, 207 Ct. Cl. 1022 (1975). There is no genuine and material factual issue in this case as to whether the agents plaintiff dealt with were authorized to bind the United States. On the record before us they clearly were not. Moreover, the United States is not estopped to deny the authority of its agents. *California-Pac. Util. Co.* v. *United States*, 194 Ct. Cl. 703, 720 (1971); *Putnam Mills Corp.* v. *United States*, 202 Ct. Cl. 1, 479 F. 2d 1334 (1973). We have examined the other contentions raised by plaintiff and find them to be without merit.

"IT IS THEREFORE ORDERED, upon consideration of defendant's motion for summary judgment and the opposition thereto, together with the briefs, affidavits and documentary exhibits, without oral argument, that the said motion be and it hereby is allowed. The petition is dismissed."

On May 4, 1976 plaintiff filed a petition for certiorari.

No. 318–75. FEBRUARY 13, 1976

Shell Oil Company

Court of Claims jurisdiction; water pollution control; oil spill clean-up costs; "onshore facility."—On February 13, 1976 the court issued the following order:

Before COWEN, *Chief Judge*, KUNZIG and BENNETT, *Judges*.

"This case comes before the court on defendant's motion to dismiss, filed October 24, 1975. Plaintiff's petition alleges entitlement under 33 U.S.C. § 1161(i)(1) (1970) [since recodified as 33 U.S.C. § 1321(i)(1) (Supp. III, 1973)] for its reasonable costs expended in cleaning up a certain oil spill which originated from a tanker and a fuel barge, neither of which were owned by it. Plaintiff says that because the subject vessels at the time were moored alongside its dock, situated in its slip, the spill came from its 'onshore facility' which encompasses both the dock and the slip.

"We sympathize with plaintiff's position, having taken expeditious action to contain and clean up an oil spill at the earliest moment reasonably possible. However, we are constrained by the statute to hold that this spill, if it occurred as alleged, did not come from an 'onshore facility.' Obviously an instrumentality which is afloat is not 'onshore'; nor can plaintiff's land submerged for use as a slip be considered onshore. 33 U.S.C. § 1321(a)(10) (Supp. III, 1973). Plaintiff's interpretation would render that statutory term meaningless, contrary to settled rules of construction. The facts alleged do not state a claim which is within our jurisdiction.

"IT IS THEREFORE ORDERED, upon consideration of defendant's motion to dismiss and the opposition thereto, without oral argument, that the said motion should be and it hereby is allowed. The petition is dismissed."

No. 111–74. FEBRUARY 13, 1976

Chris Craft Industries, Inc.

Contracts; breach; damages; quantum meruit; subcontracted facility.—On February 13, 1976 the court issued the following order:

Before COWEN, *Chief Judge*, KUNZIG and BENNETT, *Judges*.

"This case comes before us on defendant's motion for summary judgment, filed June 17, 1975. Plaintiff was a subcontractor which obligated itself to its prime contractor, Thiokol Chemical Corporation, to provide certain facilities for the production of chemicals necessary in making a substance known as 'CS,' which is a riot control agent. The prime contract between defendant and Thiokol called for the sale by Thiokol of 2,160,000 pounds of CS to the United States.

"The material provisions of the subcontract required the prime contractor, Thiokol, to reimburse plaintiff for its actual audited expense incurred in constructing the facilities referred to above, subject always, however, to a maximum of $1,110,000. When plaintiff had expended this amount, the facilities had not been completed. Plaintiff alleges that the contracting officer then intervened and ordered it to complete

construction using its own funds. Some $479,007.42 is said to have been spent in this endeavor, allegedly upon the contracting officer's assurance that plaintiff would receive sufficient additional contracts to compensate it for its investment. However, sufficient additional business was not forthcoming. On this basis plaintiff now claims that a contract implied in fact came into being and was breached, authorizing it a *quantum meruit* recovery for the reasonable value of benefit conferred upon the Government.

"To recover under our decisions in *quantum meruit* the plaintiff must allege and prove that it conferred some tangible benefit upon the defendant. *Prestex Inc.* v. *United States*, 162 Ct. Cl. 620, 320 F. 2d 367 (1963). The theory is based upon unjust enrichment and the reluctance of the courts to approve a forfeiture of value without compensation. In this case, however, upon a thorough review of the relevant subcontract provisions, and the arguments and authorities relied on by the parties, we are satisfied that the subcontractor was obligated, as a matter of law, to provide the production facilities—not just to work on them until $1,110,000 had been expended, as plaintiff asserts. Plaintiff did only what it was contractually obligated to do for the prime contractor in the first place, so no one has been unjustly enriched and quantum meruit does not lie. Under the prime contract defendant was entitled to receive a certain quantity of CS, nothing more. Title to the production facility was to remain in plaintiff subcontractor who built the facilities to satisfy its contract with its prime. Plaintiff was not legally obligated to make such facilities available to defendant. The value to defendant, if any, of such facilities owned by the plaintiff is too speculative to use in computing the amount of recovery even if it were allowable. Because of this conclusion we need not decide the other legal issues raised by the parties.

"IT IS THEREFORE ORDERED that defendant's motion, concurred in by plaintiff, for oral argument, is denied.

"IT IS FURTHER ORDERED upon consideration of defendant's motion for summary judgment and the opposition thereto, that the said motion is allowed. The petition is dismissed."

No. 266–75. FEBRUARY 13, 1976

Octa W. Whiteley

Civilian pay; claim for back pay and additional retirement benefits; retroactive constructive promotion.—On February 13, 1976 the court issued the following order:

Before COWEN, *Chief Judge*, KUNZIG and BENNETT, *Judges*.

"In this civilian pay case plaintiff, a retired employee of the U.S. Department of Agriculture, seeks additional pay for her Government service and added retirement benefits. Plaintiff, in effect, claims that "but for" defendant's failure properly to classify various jobs she held as a Government employee and "but for" defendant's refusal to grant hearings on employment grievances, she would have received additional promotions and would have retired at a higher grade.

"Defendant moves for summary judgment contending that plaintiff has failed to state a claim for relief. Upon consideration of defendant's motion and the parties' briefs, the court agrees.

"The gravamen of plaintiff's complaint is that due to defendant's conduct we should award a retroactive construtive promotion in this case. The short answer to this is that our power, if any, to grant promotions hinges upon legal entitlement to such a remedy based upon a statute or regulation. *Skrobot* v. *United States*, 208 Ct. Cl. 475, 534 F. 2d 237 (1975); *Peters* v. *United States*, 208 Ct. Cl. 373, 534 F. 2d 232 (1975); *Selman* v. *United States*, 204 Ct. Cl. 675, 686, 498 F. 2d 1354, 1359 (1974). Plaintiff's petition is not based upon such a statute or regulation.

"More specifically, plaintiff directs her attacks upon defendant's failure to perform desk audits, its neglect to "provide equal pay for equal work," and its refusal to provide hearings on grievance complaints.

"Recently in *Skrobot* we held that defendant's failure to conduct desk audits of a position held by a federal employee does not give the employee a *legal right* to a promotion.

> The Agency's failure to comply with the annual review requirements did not grant any legal right to a promo-

> tion for plaintiff, nor did it subject the agency to the outlandish liability of allocating vested promotion rights outside the normal competitive merit system to employees whose jobs were merely not reviewed on time. [*Skrobot*, *supra*, 208 Ct. Cl. at 483, 534 F. 2d at 241.]

Plaintiff's complaint in the instant case, insofar as it seeks additional compensation based on defendant's failures to audit, cannot be recognized.

"We have never adhered to plaintiff's second argument, "equal pay for equal work." We are constrained to follow the maxim that a Federal employee is only entitled to the pay of the position to which he has been appointed. *Peters*, *supra*, 208 Ct. Cl. at 377, 534 F. 2d at 234; *Desmond* v. *United States*, 201 Ct. Cl. 507, 525–26 (1973); *Bielec* v. *United States*, 197 Ct. Cl. 550, 560, 456 F. 2d 690, 696 (1972). Plaintiff does not allege she has ever been denied pay for a position to which she was appointed.

"Finally, plaintiff seeks to receive promotions based on defendant's refusal to grant her hearings on the "desk audit" complaints. This goes one step beyond *Skrobot*. However, the principle remains the same. Having concluded that no vested promotion right stems from defendant's alleged failure to audit, it would be equally "outlandish" to find such a promotion right based on defendant's concurrent failure to provide grievance hearings.

"To summarize, in the instant case plaintiff bases her suit for backdated promotion and enhanced active service and retirement pay on defendant's alleged failures to conduct audits of her positions, its failure to give "equal pay for equal work," and its refusal to provide a hearing for grievances filed by plaintiff. As we recently held in *Skrobot*, such conduct by the Government does not give rise to a vested promotion right on the part of the employee.

"Accordingly, IT IS HEREBY ORDERED that defendant's motion for summary judgment is granted and plaintiff's petition is dismissed."

Plaintiff's suggestion for rehearing *en banc* and motion for new trial, etc. were denied April 23, 1976. On July 21, 1976 plaintiff filed a petition for certiorari.

No. 302–75. FEBRUARY 13, 1976

Sergeant Joseph H. Brooks

Military pay; release from active duty; Selection Board passovers for promotion; necessity for compliance with regulations of Executive Department; motion for summary judgment; existence of issue of material fact; remand to trial division.—On February 13, 1976 the court issued the following order:

Before COWEN, *Chief Judge*, KUNZIG and BENNETT, *Judges*.

"This military pay case comes before us on defendant's motion for summary judgment filed October 14, 1975. At all relevant times prior to July 1, 1975, plaintiff was on active duty as a captain in the United States Air Force Reserve. Plaintiff was released from active duty on June 30, 1975, on the basis of his having failed to be selected for promotion to temporary major by two selection boards, the latter of which met on October 7, 1974. Defendant admits that plaintiff examined his selection jacket on January 21, 1975, and found that his Officer Effectiveness Report (OER) covering the period July 1, 1973 through January 1, 1974, was missing. This OER described plaintiff as an exceptional officer who should be promoted 'well ahead of contemporaries.' While still on active duty plaintiff made application to the Air Force Board for the Correction of Military Records seeking an order voiding his second pass-over on the basis that his selection jacket was incomplete at the time the fiscal year 1975 selection board met. The Correction Board denied his petition on April 3, 1975. Defendant asserts that the Correction Board did not act arbitrarily and capriciously as a matter of law, and that the case is outside the pale of our Tucker Act jurisdiction, 28 U.S.C. § 1491 (1970), or alternatively, fails to state a claim upon which relief may be granted.

"A motion for summary judgment cannot be granted under Rule 101(d) unless the movant establishes that there is no genuine issue as to any material fact, *e.g.*, *Housing Corp. of America* v. *United States*, 199 Ct. Cl. 705, 710, 468 F. 2d 922, 924 (1972). In this case, after a thorough review of the motion and briefs, we conclude that there exists an imposing issue of material fact which entitles plaintiff to a trial;

namely, whether plaintiff's selection jacket before the fiscal year 1975 temporary major selection board contained the OER in question. We have examined in detail AFR 36–89 of 28 April 1971, paragraphs 30b and 31b, as well as AFR 35–44 of 31 July 1974, particularly paragraphs 1–7 and 1–8 and Table A3–2 on page A–7. Taken together, these regulations clearly require that a selection jacket contain OERs not duly stricken by appropriate authority. *Cf. Yee* v. *United States*, 206 Ct. Cl. 388, 512 F. 2d 1383 (1975); *Weiss* v. *United States*, 187 Ct. Cl. 1, 408 F. 2d 416 (1969). Plaintiff has alleged as a fact, which is admitted by defendant, that the jacket did not contain an existing favorable OER on January 21, 1975. The evidence might justify the fact finder in drawing an inference that the OER was not before the selection board in October 1974. Defendant has provided an affidavit reciting that in the normal chain of events all OERs do find their way into selection jackets, and that it is reasonable to infer that on October 7, 1974, plaintiff's selection jacket OER coverage was complete. This factual dispute precludes summary judgment.

"Defendant also argues that under 10 U.S.C. § 681(a) (1970) as construed in our recent decision in *Abruzzo* v. *United States*, 206 Ct. Cl. 731, 513 F. 2d 608 (1975), once a reserve officer is released from active duty this court has no basis for review of such release. It is true that 10 U.S.C. § 681(a) invests service Secretaries with wide discretion in determining when to release a reserve officer from active duty. However, where a Secretary puts constraints upon the scope of that discretion by promulgating regulations calculated to protect the rights of reserve officers, administrative actions will be evaluated by inquiring as to whether such regulations were complied with. *Borgford* v. *United States*, Ct. Cl. No. 125–75 (Order, January 30, 1976). *Service* v. *Dulles*, 354 U.S. 363 (1957). In this case, unlike *Abruzzo*, we are concerned with compliance or noncompliance with a specific series of regulations requiring inclusion of OERs in selection jackets. We are not substituting our own discretion for that of the Secretary; we are simply determining whether authorized officials complied with departmental directives.

Abruzzo cannot properly be read as affecting the *Service* doctrine in the manner defendant asserts.

"IT IS THEREFORE ORDERED, upon consideration of defendant's motion for summary judgment and the opposition thereto, and the supplemental brief filed by plaintiff, without oral argument, that the said motion for summary judgment be, and it is hereby denied. The case is remanded to the trial judge for further proceedings."

No. 183–72. FEBRUARY 27, 1976

William W. Kelly, et al.

Eminent domain; taking; just compensation; valuation of property; witnesses; litigation expenses; developmental expenses prior to taking; Redwood National Park Act.—On February 27, 1976 the court issued the following order:

Before SKELTON, *Judge*, Presiding, NICHOLS and BENNETT, *Judges*.

"This case comes before the court on exceptions by both parties, filed October 8, and November 5, to the opinion, findings, and recommended decision of Trial Judge Thomas J. Lydon, filed May 7, 1975, pursuant to Rule 134(h). Upon consideration thereof, and upon briefing and oral argument, the court agrees with the trial judge's recommended decision, copies of which have been furnished to the parties. It hereby adopts the said decision as the basis for its judgment in this case, with modifications by the court.

"The case is for determination of just compensation for a taking of land for Redwood National Park under Pub. L. 90–545, approved October 2, 1968, 82 Stat. 932, 16 U.S.C. § 79a. The decision and findings divide the land taken and adjacent land in the same ownership into 'segments'. Segment C consisted of 325 acres, 120 of which the defendant took. The trial judge, with what we consider substantial support in the evidence, valued the whole 325 acres at $868 per acre, which he mistakenly added up to be $281,000. The correct figure is $282,100, to which we correct the opinion and findings. The value of the 205 acres not taken being found

to be $41,000, after the severance, the net award for Segment C is $241,100.

"With respect to Segment F, the trial judge referred to estimates by one of plaintiffs' experts at $7,500 per acre, and by another a figure of $20,000 per acre for 14 acres only, which he found unworthy of consideration, and $5,000 per acre for the remainder. He referred to estimates by defendant's experts at $1,750 and $1,500 per acre. For what we consider various sufficient reasons, and with support of substantial evidence, the trial judge found the value of this segment to be $4,000 per acre. He commented that this figure was a mean between the high and low valuation estimates. We cannot relate this to actual high and low figures. The mean between $7,500 and $1,500 would be $4,500, which figure is not as well supported by evidence as $4,000 is, though it would have been within the permissible range. A mean of plaintiffs' low and defendant's high estimates would be only $3,375, at least as to 30 of the 44 acres. We note that the trier of fact took a careful view. He 'inspected this segment and was impressed with the scenic beauty it offered and its potential for future commercial and/or residential development'. By the better opinion, what is seen on such a view is evidence. *Columbia Heights Realty Co.* v. *Rudolph*, 217 U.S. 547, 560 (1910); *Miller* v. *United States*, 54 F. Supp. 162 (W.D. Pa. 1943); *United States* v. *A Certain Tract*, 47 F. Supp. 31 (S.D. Ga. 1942). Thus the trier of fact who has taken a view is not helpless if the expert testimony is in conflict and all unsupportably high or low, as is so often the case. *The Conqueror*, 166 U.S. 110, 131 (1897). ORGEL, VALUATION UNDER EMINENT DOMAIN (1936) at 428, makes the persuasive suggestion that real property seen by the trier of fact on a view is thereby made into "real evidence" of similiar status to a tangible object received as an exhibit in a court room trial. He would not use it to justify the trier in ignoring the weight of the value testimony, but that has not been done here. Moreover, in selecting the $4,000 per acre figure our trier of fact compared it with the other segments and clearly had a ratio in his mind that his per acre value for this segment should bear to others. We indulge every presumption that he did not arrive at a determination based wholly or

chiefly on a mistaken quotient, but if he did, we exercise our prerogative to substitute our fact finding for his, and we find the value of Segment F per acre was $4,000. We make, therefore, no adjustment for that segment.

"Accordingly, as an ultimate finding, the fair market value of the land, which encompasses severance damage considerations to land not taken, with improvements and standing timber thereon, acquired by defendant from plaintiffs on October 2, 1968, is found to be $647,111. Plaintiffs have received payment in the principal amount of $364,025 from defendant for the said property. Accordingly, plaintiffs are entitled to recover herein the remainder of the value of said property or $283,086, with the appropriate rate of interest which is found to be 6 percent.

Since we do not publish or redistribute the text of the opinion and findings we have adopted as the basis for our judgment, we set forth our modifications here, other than numerical corrections resulting from our Segment C corrections, which are obvious.

Page 37, last 3 lines and P. 38, first 4 lines Delete, and insert the following:

> Utilizing the above view and the opinions of the experts to the extent stated, it is determined, that the value per acre of Segment F is $4,000.

Page 105, five lines from the bottom, Delete the 3 sentences that begin: "The mean figure * * *"; ending with "on this record"

No insert.

CONCLUSION OF LAW

"The court concludes as a matter of law that plaintiffs are entitled to judgment against defendant for the taking on October 2, 1968, of 435.87 acres of plaintiffs' land, with improvements and standing timber thereon, and for severance damage to the remaining 205 acres of land not taken from plaintiffs, in the sum of two hundred eighty-three thousand eighty-six dollars ($283,086), together with simple interest thereon as a part of just compensation at the rate of 6 percent per annum from October 2, 1968, until the date of payment of the

judgment. It is further provided that plaintiffs may obtain payment of any such award allowed by judgment herein only upon tender of a deed to such property as is covered by said judgment in such form as the Attorney General may deem necessary to assure defendant a valid fee simple title to said property. The court further concludes that plaintiffs are not entitled to recover litigation expenses incurred because of the proceedings in this case, nor are they entitled to recover expenditures incurred in developing the property prior to the taking."

No. 112–74. FEBRUARY 27, 1976

Franklin Engine Company, Inc.

Renegotiation of contracts; judgment in aid of execution of order of Renegotiation Board.—With reference to the order entered September 20, 1974 in the above-identified case and reported at 205 Ct. Cl. 835, since plaintiff has not applied for the hearing that the order allowed and there being therefore no facts shown that might justify a continuing denial of the pre-judgment remedy which the Government continues to seek, that is, a judgment in aid of execution of the order of the Renegotiation Board, on February 27, 1976 the court, by order, entered judgment for defendant against plaintiff in the amount of $87,934, less any applicable federal income tax credits, plus interest as provided by law, and remanded the case to the trial judge to conduct such further proceedings as the final disposition of this suit might require.

No. 97–75. FEBRUARY 27, 1976

Daniel E. McMackin

Military pay; claim for active duty back pay; scope of Correction Board action.—On February 27, 1976 the court issued the following order:

Before DAVIS, *Judge*, Presiding, SKELTON and BENNETT, *Judges*.

"This case comes before the court on defendant's motion and plaintiff's cross-motion for summary judgment. Oral argument has been had and the briefs have been considered.

In May 1969 plaintiff, while a Marine noncommissioned officer, received a warrant promoting him to Gunnery Sergeant. Shortly thereafter he was told that, in view of the promotion, he had to agree to extend his current enlistment (then due to expire on September 1, 1969) for at least two years. This was an erroneous requirement. On his refusal, his promotion was rescinded and he was demoted to Staff Sergeant. He did not then seek to reenlist and was discharged from the service in September 1969 pursuant to the expiration of his current enlistment; at that time he joined the reserves. Thereafter he sought relief from the Board for the Correction of Naval Records which determined (as approved by the Assistant Secretary of the Navy) as follows:

"1. That his records be corrected to show his promotion to Gunnery Sergeant on May 23, 1969 (the date of the original promotion).

"2. That he was assigned the date of rank that he would have been assigned as a result of his selection for promotion to the grade of Gunnery Sergeant.

"3. That if he reenlisted in the Marine Corps within 90 days of the Correction Board's action, he would be reenlisted in the grade of Gunnery Sergeant with the date of rank assigned as a result of the action in 2. above.

"4. That all material referring to the events that occurred on May 23, 1969 and subsequent actions by the plaintiff to obtain relief be removed from his naval record.

"5. That the Navy Department pay plaintiff all monies lawfully found to be due as a result of the foregoing correction of naval record.

"Plaintiff reenlisted in the Marine Corps as a Gunnery Sergeant within the required 90 days (*i.e.* on November 29, 1973) and was then paid $244.09, representing the difference between the active duty pay of a Gunnery Sergeant and of a Staff Sergeant for the period from May 23, 1969 to his discharge on September 12, 1969, as well as the difference in leave pay and reserve drill pay. In this action he seeks active duty back pay as a Gunnery Sergeant for the period he was not in fact on active duty (September 12, 1969–November 29, 1973).

"On the record and the proceedings of the Correction Board the court concludes:

"(1) The Correction Board's decision shows that it did not order that plaintiff be paid active duty back pay for the period from his discharge (September 12, 1969) to his reenlistment (November 29, 1973), nor did it determine that he was to be considered on active duty during that period.

"(2) Plaintiff has already received all the monies owing to him under the Correction Board's decision and action.

"(3) In all the circumstances it was not illegal, arbitrary, capricious, or an abuse of discretion for the Correction Board to refuse to hold plaintiff entitled to active duty pay for the period from September 12, 1969 to November 29, 1973, or to refuse to hold that he should be considered as on active duty during that period. Among other things, the Board could appropriately consider that, although in September 1969 (and thereafter) plaintiff could have sought relief through the Correction Board and in other ways while remaining in the Marine Corps, he deliberately chose to leave the service and reenter civilian life.

"IT IS THEREFORE ORDERED that defendant's motion for summary judgment is granted, plaintiff's cross-motion is denied, and the petition is dismissed."

No. 336–74. MARCH 5, 1976

Manufacturers Service Co., Inc.

Renegotiation of contracts; pleading and practice; addition of parties; recovery of excessive profits; mitigation of effect of renegotiation; reduction in judgment by allowance of additional tax credits.—On March 5, 1976 the court entered the following order:

Before DAVIS, *Judge*, Presiding, NICHOLS and KASHIWA, *Judges*.

"This case comes before the court on plaintiff's motion, filed October 6, 1975, for addition of parties and allowance of additional tax credits and on defendant's motion, filed February 19, 1976, for leave to file (attached) IRS letters, to which latter motion plaintiff's response of February 23, 1976,

states that plaintiff "does not oppose the admission of the February 11, 1976 letters into the record". The motions have been considered, together with the various responses and replies, as supplemented, without oral argument.

"Plaintiff says that the plaintiff corporation has been liquidated and dissolved, and asks for the addition as parties to this action and to the judgment of June 25, 1975, 207 Ct. Cl. 185, 518 F. 2d 1202, of the two stockholder-distributees, the Messrs. Irish. It now appears, however, that the plaintiff, though liquidated in 1970, was not and is not dissolved under the law of its state of incorporation and still exists as an entity which can sue and be sued. The judgment against it of June 25, 1975, is therefore a valid judgment against an existing corporation which was the only entity against which the renegotiation orders were issued. The United States opposes the addition, as parties to the action and the judgment, of the Messrs. Irish, and is willing to proceed with its judgment against the company itself. Moreover, the status of the Messrs. Irish as stockholders-distributees was well known to the plaintiff during the proceedings on the Government's motion which was decided on June 25, 1975, but no effort was made by plaintiff to add the Messrs. Irish as parties during those proceedings, and this step was not suggested until the present motion was filed on October 6, 1975. In these circumstances we see no need now to add these individuals as parties.

"Plaintiff also asks for a reduction in our judgment of June 25, 1975, to take account of tax credits said to be available to the Messrs. Irish on the allegedly "excessive profits" distributed by the company to them. This point, too, was fully available during the proceedings on the Government's motion for judgment in aid of execution of the renegotiation orders, but was not raised at all by plaintiff. In addition, we consider that, when we render judgment (in aid of collection) only against the renegotiated person or entity, we may take account in calculating that judgment only of the tax credit available to the person or entity against whom judgment is rendered—not the tax credits, if any, available to possible distributees or transferees of the property of the renegotiated person or entity. We do not consider that Internal

Revenue Code § 1481 confers jurisdiction on us to adjust the judgment for its tax consequences except as that statute specifically spells out.

"IT IS THEREFORE ORDERED that plaintiff's said motion for addition of parties and allowance of additional tax credits be and the same is denied."

No. 196–73. MARCH 12, 1976

Assateague Beach Corporation

Lease; breach of contract; license for use v. property interest; damages.—Plaintiff seeks just compensation or breach of contract damages for its ouster in 1973 by the Department of the Interior from the operation of a bathhouse and refreshment service at the Assateague Island National Seashore, Virginia, pursuant to a 1962 sublease entered into with the Chincoteague Bridge and Beach Authority. In a recommended decision filed December 29, 1975 (reported in full at 21 CCF para. 84,502), Trial Judge David Schwartz concluded that plaintiff's ouster from its concession was a breach of contract wrongfully depriving plaintiff of the value of the remaining 26 years on its lease term. In determining the nature of plaintiff's interest—an estate in land or a right only to do a limited business—as affecting the measure of recovery, Trial Judge Schwartz concluded that plaintiff-concessionnaire acquired no estate in land—no such absolute or generalized dominion and control as distinguishes the true lease or leasehold—but only a license for use for a stated purpose; that plaintiff, having no interest in land, on termination of the right to do business, is entitled to be made whole by damages for breach of contract and not by just compensation; and that the applicable measure of damages is the net profits plaintiff would reasonably expect to earn in the remaining 26 years of the lease. This case came before the court on defendant's motion that the court adopt the recommended decision to which plaintiff has not excepted. Upon consideration thereof, without oral argument, since the court agrees with the said decision, the court by order dated March 12, 1976 granted defendant's motion, adopted the decision as

the basis for its judgment in this case, concluded that plaintiff is entitled to recover and entered judgment for plaintiff against defendant for $114,408.

No. 287–72. MARCH 12, 1976

Charles D. Weaver

Contracts; breach; delay damages; equipment costs; rental rates v. actual costs; evidence of loss.—On March 12, 1976 the court entered the following order:

Before DAVIS, *Judge*, Presiding, SKELTON and KASHIWA, *Judges*.

"This case involves a claim by plaintiff, Charles D. Weaver, that the Government breached a contract to build a road. Plaintiff entered into a written contract with the United States to build the road in the Allegheny National Forest in Warren County, Pennsylvania, for the sum of $48,418.20, which was later raised to $57,615.04, due to seven change orders. The contract was dated March 20, 1966. Under the terms of the contract, defendant, through the United States Forest Service (United States Department of Agriculture), was obligated to prepare all specifications, plans, and drawings, to do all engineering and survey work, and more particularly, was obligated to stake the road to guide plaintiff in performing his obligations under the contract. Plaintiff says that defendant erroneously staked the road, causing plaintiff to do unnecessary work, to lose time, manpower, and efficiency; and that he suffered financial loss and damage to the extent of $50,000 for which he made claim to the contracting officer. Plaintiff eventually completed his work under the contract, and his performance was accepted by the Government. On February 14, 1967, the contracting officer decided that plaintiff's claim was outside the scope of his authority and denied the claim. On February 24, 1967, plaintiff appealed this decision of the contracting officer. On March 12, 1969, the United States Department of Agriculture Board of Contract Appeals granted the Government's motion to dismiss the appeal, holding that 'in the absence in the contract of a suspension of work clause, this Board is without

jurisdiction and has no alternative but to dismiss the appeal.' On July 12, 1972, plaintiff filed his petition in this court claiming $50,000 for breach of contract.

"Plaintiff calculates his delay-damages claim on the basis of rental costs for equipment used on the job, despite the fact that plaintiff personally owned all the equipment. Defendant objected to plaintiff's reliance on rental costs, and the trial judge issued a pretrial conference memorandum and order which directed plaintiff to file with the court 'a statement of any alternative damage theory he may plan to interject at trial.' Plaintiff stated in his submission to this order that he did not plan to interject at trial any damage theory as an alternate or in addition to his main damage theory of rental costs. The case is before us on defendant's motion for summary judgment.

"Although the question of liability has not been decided and is very much in dispute, the condition of the case as submitted in the briefs of the parties discloses only one point of law in issue. It is, namely, whether, as a matter of law, rental costs are an invalid measure of delay damages for contractor-owned equipment in a suit for breach of contract. The court's resolution of this question will necessarily determine whether this case proceeds to trial or ends here. Plaintiff does not contend that his exclusive reliance on the rental rates is due to the nonavailability or nonexistence of primary evidence, *i.e.*, actual costs, depreciation, maintenance, etc., of the equipment used. He merely claims that it would be unfair to require him to use actual costs, because he is a small contractor and bought most of his equipment in a used condition and reconditioned it himself, and that, consequently, actual costs would not put him in as good a financial condition as he would have been in had the breach not occurred.

"Decisions of this court indicate that only where primary evidence, *i.e.*, actual costs, is unavailable, will resort be made to secondary evidence. *Bennett* v. *United States*, 178 Ct. Cl. 61, 67, 371 F. 2d 859, 862–63 (1967). Also, if secondary evidence is to be used, it must be based on associated general contractor survey data and not rental rates. *Meva Corporation* v. *United States*, 206 Ct. Cl. 203, 511 F. 2d 548, 559 (1975); and *L. L. Hall Constr. Co.* v. *United States*, 177 Ct.

Cl. 870, 379 F. 2d 559 (1966). As noted above, plaintiff has made no effort to explain the use of rental costs, other than to say it would be unfair to require him to use actual costs. Plaintiff has not met his burden of demonstrating that the actual book costs are unavailable, inadequate, or incomplete, or do not fairly represent the full costs rightly attributable to the particular contract, which he must do in order to substitute AGC costs or rental costs. *See Meva Corporation* v. *United States*, *supra*, n. 10a. *See also*, *L. L. Hall Constr. Co.* v. *United States*, *supra*.

"Accordingly, IT IS ORDERED that defendant's motion for summary judgment be granted and plaintiff's petition dismissed."

No. 466–72. MARCH 12, 1976

Joanell Laboratories, Inc.

Contracts; interpretation; breach; amendment to pleadings; sanction of dismissal; summary judgment, when appropriate.—Plaintiff seeks to recover in its petition, as amended, money damages, costs and injunctive relief growing out of a fixed-price contract with the Naval Training Devices Center to supply small arms gunfire simulators, handbooks, reproducible engineering drawings, and other related items. The present litigation centers around the construction and/or interpretation of the language of a supplemental agreement relating to source control drawings. There is considerable confusion as to the basis for plaintiff's breach of contract claim, and at oral argument plaintiff stated that its claim was based on the agency's failure to include all of the source control drawings referred to in the supplemental agreement in the bid packages prepared for purposes of subsequent invitations for bids, and that the failure caused it economic loss because competitors who were successful bidders were not put on notice by the legend appearing on the drawing that plaintiff was the "sole source" for procurement of the item depicted on the drawings. Defendant requested, in view of plaintiff's pleading and pretrial submission deficiencies, the sanction of dismissal of the petition, but Trial Judge Thomas J. Lydon, in a recommended decision filed Novem-

ber 13, 1975, declined to grant the request on the basis that dismissal under the circumstances would be harsh and unjust. Trial Judge Lydon concluded that plaintiff be allowed to amend its petition so as to articulate the basis for plaintiff's contention that defendant violated its obligations under the supplemental agreement and thus breached the contract, concluded that since there is a dispute about the rights and obligations flowing from the said agreement summary judgment is inappropriate to resolve the matter, and directed plaintiff to file an amended petition. On March 12, 1976 the court, by order, adopted the recommended decision as the basis for its judgment in this case, denied defendant's motion for summary judgment, granted defendant's motion to dismiss to the extent that plaintiff's claim sounds in tort and as to the claim for injunctive relief and dismissed those portions of plaintiff's amended petition, directed plaintiff to file an amended petition to comply strictly with the Rules of this court (*see* Rules 32(a), 34(b) and 35(a)) as set forth in the order, and remanded the case to the trial division for further proceedings consistent with the recommended decision. On April 9, 1976 plaintiff filed an amended petition.

No. 353–74. MARCH 12, 1976

Remco Hydraulics, Inc.

Contracts; default termination; failure to deliver acceptable items; design defects; assumption of responsibility for performance.—Plaintiff was default terminated for failure to deliver acceptable contract items. This case is before the court following decisions of the Armed Services Board of Contract Appeals adverse to plaintiff sustaining a default termination and an assessment of reprocurement costs. Plaintiff's basic argument is that performance of the contract was impossible because the gauges made by it on the Government's design, for which the Government thereby assumed responsibility, were defective in that in tests they accepted defective parts and rejected acceptable ones, thus making inspection ineffectual. The Board held that the Government's role in recommending a gauge design to plaintiff did not constitute

an assumption of responsibility for its performance. In a recommended decision filed November 20, 1975 (reported in full at 21 CCF para. 84,398), Trial Judge C. Murray Bernhardt concluded that the default termination and assessment of reprocurement costs were proper. This case came before the court on defendant's request that the court adopt the recommended decision on plaintiff's and defendant's motions for summary judgment, plaintiff having failed to file a request for review thereof by the court. Upon consideration thereof, without oral argument, since the court agrees with the trial judge's decision, on March 12, 1976 the court granted defendant's motion and adopted the decision as the basis for its judgment in this case, denied plaintiff's motion for summary judgment, granted defendant's motion for summary judgment, concluded that plaintiff is not entitled to recover, and dismissed the petition.

No. 68–75. MARCH 12, 1976

Clair D. Olsen

Court of Claims jurisdiction.—On March 12, 1976 the court entered the following order:

Before DAVIS, *Judge*, Presiding, SKELTON and KASHIWA, *Judges*.

"This case comes before the court on defendant's motion for summary judgment. Plaintiff claims that he was improperly denied a promotion and he seeks relief. *United States* v. *Testan*, 424 U.S. 392 (1976), in reversing a decision of this court stated:

> The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages. The Court of Claims has recognized that the Act merely confers jurisdiction upon it whenever the substantive right exists. *Eastport Steamship Corp.* v. *United States*, 178 Ct. Cl. 599, 605–607, 372 F. 2d 1002, 1007–1009 (1967). * * * [At p. 398.]

The Court then looked into two other statutes invoked by the employees as to whether the statutes conferred a substantive right to recover money damages from the United States.

"In the instant case paragraph 4 of the amended petition states: '4. Jurisdiction of this Court is founded on 28 U.S.C. § 1491 and 5 U.S.C. §§ 702–06, 5596.' The Supreme Court stated that the Tucker Act does not create a substantive right. An examination of the other cited statutes points to no substantive right to money damages as the result of a promotion not having been made. For the foregoing reasons

"IT IS ORDERED that defendant's motion for summary judgment is granted and plaintiff's petition is dismissed."

No. 157–75. MARCH 12, 1976

John G. Case

Military pay; limitation of actions; accrual of cause of action.—On March 12, 1976 the court entered the following order:

Before DAVIS, *Judge*, Presiding, SKELTON and KASHIWA, *Judges*.

"This case comes before the court on defendant's motion, filed August 11, 1975, to dismiss the petition (which has been transformed, treated and deemed to be a motion for summary judgment by the filing of various Army documents in support of the motion) and on plaintiff's cross-motion, filed September 4, 1975, for summary judgment, having been considered, together with the opposition thereto, without oral argument.

"Plaintiff was discharged from the Army on October 6, 1964, and all the Army's actions on which he founds his claims occurred on or prior to that date, which was ten and a half years prior to the institution of this action in May 1975. The claims all accrued no later than October 6, 1964, and suit could have been brought at that time. On none of the claims was the statute of limitations tolled by the subsequent permissive application to the Correction Board. *See, e.g., Girault* v. *United States*, 133 Ct. Cl. 135, 144–45, 135 F. Supp. 521, 526–27 (1955); *Mathis* v. *United States*, 183 Ct. Cl. 145, 391 F. 2d 938 (1968); *Kirby* v. *United States*, 201 Ct. Cl. 527, 531–32 (1973), *cert. denied*, 417 U.S. 919 (1974). In addition, the record shows that plaintiff was not under "legal disability", within the meaning of 28 U.S.C.

§ 2501, in October 1964 or since, and plaintiff has failed to prove the contrary. The statute of limitations therefore cannot be tolled on that ground. The petition is dismissed as barred in all respects by limitations and the court does not reach the other defenses asserted by the Government.

"IT IS THEREFORE ORDERED that defendant's motion to dismiss, (treated as a motion for summary judgment) is granted, plaintiff's motion for summary judgment is denied and plaintiff's petition is dismissed."

No. 284–75. MARCH 12, 1976

Donald W. McLean

Court of Claims jurisdiction; employment contract v. appointment; Postal Service.—On March 12, 1976 the court entered the following order:

Before DAVIS, *Judge, Presiding*, SKELTON and KASHIWA, *Judges.*

"The plaintiff alleges that he was promised a job as a mail carrier by the United States Postal Service, but before he could begin work he was informed that the job was no longer available. He sues here for damages in the form of lost wages based on his claim of breach of contract and also for specific performance of the alleged contract. The Government has moved to dismiss the case on the ground that the court lacks jurisdiction of the case.

"It is clear that plaintiff never had a contract with the United States. 39 U.S.C. § 1001(a), Pub. L. 91–375 provides that all officers and employees of the Postal Service are required to be appointed rather than hired by contract. Since plaintiff has no contract and has never been appointed to any position by the Postal Service, has never taken the oath of office, nor performed any work as an employee of such service for which money is presently due, he is not entitled to recover. *Price* v. *United States*, 65 Ct. Cl. 91, *cert. denied*, 277 U.S. 587 (1928); *Barea* v. *United States*, 115 Ct. Cl. 44 (1949); *Applegate* v. *United States*, 207 Ct. Cl. 999 (1975);

Urbina v. *United States*, 192 Ct. Cl. 875 (1970); and 39 U.S.C. § 1001(a).

"Accordingly, defendant's motion to dismiss is granted and plaintiff's petition is dismissed."

No. 339–75. MARCH 12, 1976

Lawrence Francis Bennethum

Military pay; enlistment; right to remain in service.—On March 12, 1976 the court entered the following order:

Before DAVIS, *Judge*, Presiding, SKELTON and KASHIWA, *Judges.*

"This case comes before the court on defendant's motion, filed November 12, 1975, to dismiss plaintiff's petition on the ground that plaintiff has failed to state a claim upon which relief may be granted. Defendant's position is that plaintiff alleges a contractual claim. Defendant's motion is based on *Deschler* v. *United States*, 203 Ct. Cl. 477 (1974), and *Waller* v. *United States*, 198 Ct. Cl. 908, 461 F. 2d 1273 (1972), wherein this court held that an enlisted man in the military service does not have a contractual right to remain in the service until the expiration of his enlistment term. Defendant's motion to dismiss is well taken but plaintiff is granted leave to amend his claim.

"IT IS ORDERED that defendant's motion to dismiss be and is hereby granted but plaintiff is granted leave to amend his claim within 30 days from the date hereof, setting forth any claims he may have for back pay based on violations of the Constitution, statutes, or regulations in dismissing him, failing which filing by plaintiff, his petition pending before the court shall be dismissed without further action by the court."

On May 18, 1976 the petition was dismissed pursuant to the foregoing order.

No. 363–75. MARCH 12, 1976

Celestial Navigation Corporation

Court of Claims jurisdiction; water pollution control; oil spill clean-up costs; transfer of case to cure defect of juris-

diction.—On March 12, 1976 the court entered the following order:

Before DAVIS, *Judge*, Presiding, SKELTON and KASHIWA, *Judges.*

"This case comes before the court on defendant's motion, filed December 2, 1975, to dismiss plaintiff's petition on the grounds that this court lacks subject matter jurisdiction of the alleged claim, having been considered, together with the response in opposition thereto, without oral argument.

The first count of the petition fails to comply with the jurisdictional requirements of 33 U.S.C. § 1321(i)(1) in that plaintiff admits that the oil in question was not discharged from its vessel, the M/S *Adelina. See Shell Oil Co.* v. *United States*, *ante* at 699. The second count fails to state a claim under 28 U.S.C. § 1491 but may state a claim in admiralty. *Gulf Refining Co.* v. *United States*, 207 Ct. Cl. 971 (1975). The court does not decide whether any such admiralty claim is properly stated but pursuant to 28 U.S.C. § 1506 transfers the case to the United States District Court for the Northern District of California. The Clerk of this court will forward the record in this court to the Clerk of that court.

"IT IS SO ORDERED."

No. 409–74. MARCH 17, 1976

Walter J. Twomley and Katherine Twomley

No. 410–74. MARCH 17, 1976

Robert O. Blount and Lorna M. Blount

Taxes; income tax; deductions; traveling expenses to and from work.—On March 17, 1976 the court entered the following order:

Before COWEN, *Chief Judge*, DAVIS and NICHOLS, *Judges.*

"These cases come before the court upon stipulations of facts and upon the briefs of the parties. Upon consideration thereof and after hearing oral argument, the court finds:

"(1) After filing timely claims for refund, the taxpayers, Walter J. Twomley and Robert O. Blount (joined herein by

their wives only because joint returns were filed), brought these actions for a refund of income taxes resulting from a disallowance by the Commissioner of Internal Revenue of deductions which plaintiffs claimed for travel expenses incurred in the year 1968.

"(2) Each of the taxpayers resided with his family in the vicinity of New York City where he was employed by the Penn Central Transportation Company (Penn Central). Pursuant to the merger of the Pennsylvania Railroad and the New York Central Railroad, each of the taxpayers was transferred by Penn Central from his post of duty to a new post of duty in Philadelphia. In May 1968, they commenced work for Penn Central in Philadelphia in permanent positions which they have retained to the present time.

"(3) After they had commenced work in Philadelphia, taxpayers' families remained in the residences owned by them in New York. Following the sale of these residences, their families joined them in Philadelphia in the Fall of 1968. Until the families moved to Philadelphia, taxpayers continued to pay for the maintenance of their families in the New York area. During the period between the transfers to their new permanent positions in Philadelphia and the intervening 5 months when their families joined them in Philadelphia, plaintiffs incurred expenses for meals, lodging, tips, laundry and dry cleaning in Philadelphia, and some transportation costs between Philadelphia and New York. The deductibility of these expenses is the sole issue in these cases. Penn Central reimbursed each of the plaintiffs for such expenditures, and taxpayers included the amounts reimbursed as part of their gross incomes in their income tax returns for the year 1968. Thereafter, they filed claims for refund on the ground that the living expenses they incurred while living in Philadelphia without their families are deductible traveling expenses.

"Upon the foregoing findings of fact, the court concludes:

"(1) Under the provisions of Section 162 of the Internal Revenue Code of 1954 and Treasury Regulations § 1.162–2, 'only such traveling expenses as are reasonable and necessary in the conduct of the taxpayer's business and directly attributable to it may be deducted.' The regulations conform to a

requirement laid down by the Supreme Court in *Commissioner* v. *Flowers*, 326 U.S. 465 (1946) that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer.

"(2) In a number of decisions which we find factually indistinguishable from these cases, the courts have held that expenses of the same kind as those in issue here do not have the required direct connection with the carrying on of trade or business of the taxpayer or his employer to qualify for the deduction. *York* v. *Commissioner*, 160 F. 2d 385 (D.C. Cir. 1947); *United States* v. *Woodall*, 255 F. 2d 370 (10th Cir. 1958); *Light* v. *Commissioner*, 310 F. 2d 716 (5th Cir. 1962) and *Commissioner* v. *Starr*, 399 F. 2d 675 (10th Cir. 1968).

"Since we find these decisions to be applicable to plaintiffs' cases and in accord with the decision of the Supreme Court in the *Flowers* case, we conclude as a matter of law that plaintiffs are not entitled to recover.

"IT IS THEREFORE ORDERED that plaintiffs' petitions be and the same are hereby dismissed."

App. No. 4–75. MARCH 19, 1976

The Tonkawa Tribe of Indians of Oklahoma, et al.

Indian claims; appeal from Indian Claims Commission; motions to intervene; failure to file timely claims with Commission.—The Tonkawa Tribe and the Alabama-Coushatta Indians on January 7, 1972 and August 27, 1971, respectively, sought to intervene in the case of *Caddo Tribe of Oklahoma, et al.* v. *United States*, Indian Claims Commission Docket No. 226, filed August 8, 1951, claiming compensation by aboriginal title for some of the same lands claimed by the Caddo. The United States filed motions to dismiss the complaints in intervention on the ground that the interventions were barred by the jurisdictional limitation contained in 25 U.S.C. § 70k. On January 24, 1975 the Indian Claims Commission granted the motions, and an appeal was taken from this action. On March 19, 1976 the court entered the following order:

Before COWEN, *Chief Judge*, DAVIS and BENNETT, *Judges*.

"This case comes before the court on appeal by the Tonkawa Tribe and the Alabama-Coushatta Indians from the decision and findings of the Indian Claims Commission, dated January 24, 1975, in its Docket No. 226. Oral argument has been had and the briefs have been considered.

"The Commission's decision adverse to the Tonkawa Tribe and to the Alabama-Coushatta Indians is squarely governed by *United States* v. *Kiowa, Comanche & Apache Tribes*, 202 Ct. Cl. 29, 44–45, 479 F. 2d 1369, 1377–78 (1973), *cert. denied sub nom. Wichita Indian Tribe* v. *United States*, 416 U.S. 936 (1974).

"IT IS THEREFORE ORDERED that the decision of the Indian Claims Commission, insofar as appealed from by the Tonkawa Tribe and the Alabama-Coushatta Indians, is affirmed."

No. 454–70. MARCH 26, 1976

Northern Helex Company

Pleading and practice; motion for leave to take deposition pending certiorari.—The court entered the following order on March 26, 1976 in connection with the above-identified case in which court has previously entered opinions and/or orders reported at 197 Ct. Cl. 118, 455 F. 2d 546; 198 Ct. Cl. 996; 199 Ct. Cl. 998; 207 Ct. Cl. 862, 524 F. 2d 707.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, SKELTON, NICHOLS and KUNZIG, *Judges*.

"This case comes before the court on plaintiff's motion for leave to take the deposition of Henry P. Wheeler, Jr., pending certiorari. Upon consideration of the motion and defendant's opposition thereto, the court finds:

"(1) Plaintiff's motion states that the testimony to be perpetuated will cover Mr. Wheeler's understanding of (a) relevant provisions of the contract; (b) the Government's contemplation of the extent of the integration of plaintiff's plant with other facilities and the benefits accruing to the parties therefrom; (c) the Government's representation to Northern and other owners of helium-bearing gas that the nitrogen removal through the helium extraction plant would enable the owners of the gas to more fully utilize the gas streams for

other purposes; (d) the Government's knowledge of the provisions of the contract between plaintiff and Northern; (e) the Government's knowledge that the contract provisions were written with the realization that the Government contemplated that the helium plant would be inextricably integrated with other operations, and that it would not be economically feasible for Northern to discontinue operation of the helium facilities, and (f) the economic and other benefits from integration that were intended to flow to Northern Helex over and above the contract price.

"(2) Prior to the trial of this case, plaintiff took the deposition of Mr. Wheeler, resulting in a 216-page transcription thereof and including his comments about and knowledge of a number of the matters described in (1) (a) to (f) above. Mr. Wheeler testified as a witness during the trial of the case, and plaintiff had a full opportunity to cross-examine him regarding all of the matters referred to in (1) (a) to (f) above.

"(3) It is apparent that in requesting leave to take the deposition of Mr. Wheeler in respect to the matters outlined above, plaintiff is attempting to lay the groundwork for the retrial of factual issues which were tried, decided, and may not now be retried.

"Since it is not the purpose of Rule 86 to permit the taking of depositions to prove or disprove facts which have been previously tried and decided, especially in cases where the witness testified at the trial, plaintiff's motion is denied insofar as it asks leave to take a deposition for such purposes.

"Plaintiff's motion also states that plaintiff desires to take the deposition for the purposes of proving that: (a) nothing should be deducted from the contract price for the value of the helium plant or its ongoing value to the integrated operations, because the Government intended that such benefits were to be received by plaintiff, even if the contract was terminated; (b) nothing should be deducted from the contract price because of the contingent liability to the landowners/producers, and (c) no clause in the contract was intended to exculpate the Government from paying any damages if it did breach the contract. As to these items, the court finds that they involve questions of law already decided or that plain-

tiff has failed to show the relevance of the proposed inquiry or that the witness is competent to testify with respect thereto. The court also finds that plaintiff has not made an adequate showing of the necessity for perpetuating the testimony of the witness and that plaintiff's motion is not verified. *See Ash* v. *Cort*, 512 F. 2d 909, 913 & n. 16 (3rd Cir. 1975) and *Mercantile National Bank at Dallas* v. *Franklin Life Insurance Co.*, 248 F. 2d 57, 59 n. 5 (5th Cir. 1957).

"IT IS THEREFORE ORDERED that plaintiff's motion be and the same is hereby denied."

On April 7, 1976 plaintiff filed a petition for a writ of certiorari.

Nos. 233–74 and 67–75. MARCH 26, 1976

L'Enfant Plaza Properties, Inc.

Court of Claims jurisdiction; District of Columbia Redevelopment Land Agency; leases.—On March 26, 1976 the court entered the following order:

Before DAVIS, NICHOLS and KASHIWA, *Judges.*

"These cases come before the court on defendant's motion to dismiss the petitions. Oral argument has been had and the briefs have been considered. The two cases involve alleged breaches by the District of Columbia Redevelopment Land Agency (DCRLA) of its 1965 lease agreements with the plaintiff's predecessors. The sole ground of defendant's current motion is that at the relevant times the District of Columbia Redevelopment Land Agency was not a federal instrumentality which could obligate appropriated funds and the leases involved are not United States contracts—and therefore that no suit can be maintained against the United States in this court on these agreements. This suit was initially brought in the United States District Court for the District of Columbia and, on motion of the plaintiffs, was transferred here.

"Over fifteen years ago the United States Court of Appeals for the District of Columbia Circuit decided that the DCRLA was a federal agency (within the Tort Claims Act) which receives direct appropriations from the Congress. *Goddard* v. *District of Columbia Redevelopment Land Agency*, 287

F. 2d 343 (D.C. Cir. 1961). Defendant tells us here that that case was wrongly decided and should not now be followed. However, until very recently the Government accepted and relied upon the *Goddard* ruling. In our own case of *Fountain* v. *United States*, 192 Ct. Cl. 495, 497–98, 427 F. 2d 759, 761 (1970), *cert. denied*, 404 U.S. 839 (1971), the defendant, at the court's specific inquiry, assured us, citing *Goddard*, that the DCRLA was a federal agency, not a local one, and thus its contracts would be included among contracts of the United States enforceable under the Tucker Act against the United States. The same position that the DCRLA was a federal agency was taken in the United States District Court of the District of Columbia in other cases, and *Goddard* has several times been cited by the District Court in support of stands taken by the Government in suits by or against the DCRLA. The problem is coming to its end because effective July 1, 1974, the DCRLA was expressly established as an instrumentality of the District of Columbia Government.

"In view of the long-standing *Goddard* decision, the Government's acceptance and use of that decision in *Fountain* and elsewhere, and the terminal nature of the issue, we think that the better course for us to pursue is, without considering whether we would reach the same conclusion if the matter were *res nova*, to accept *Goddard* as a controlling and established precedent, and to consider the pre-1974 DCRLA as a federal entity the contracts of which may be vindicated in this court.

"IT IS THEREFORE ORDERED that defendant's motion to dismiss is denied and the cases are returned to the Trial Division."

On May 28, 1976 the court denied defendant's motion for rehearing and suggestion for rehearing *en banc*.

No. 24–75. MARCH 26, 1976

Barry R. Scharaga

Federal Aviation Administration employee; authorization of expenditures and travel; foreign duty station; estoppel;

unauthorized acts of Government agent.—On March 26, 1976 the court entered the following order:

Before NICHOLS, *Judge*, Presiding, KASHIWA and KUNZIG, *Judges.*

"Plaintiff, an employee of the Federal Aviation Administration (FAA) brings the instant action to recover travel expense reimbursements made to defendant. In 1972 plaintiff returned to the United States after serving two years in Germany. Defendant's agents at first authorized an 'advance' payment for plaintiff's temporary lodging, subsistence and home purchase expenses in connection with the transfer. However, the FAA later discovered that plaintiff was not entitled to claim these expenses under appropriate statutes and regulations. Plaintiff had received a $3079.88 'advance.' He agreed that the 'advance' would be returned to defendant through payroll deductions over a five-year period. Certain of these reimbursement deductions were made, and plaintiff now seeks to recover them.[1]

"After its ineligibility determination, the FAA sought advice from the Comptroller General as to the propriety of the decision to recoup plaintiff's 'advance.' The Comptroller General replied in the affirmative. Comp. Gen. Dec. B–177277 (Feb. 12, 1973). The Comptroller General subsequently denied plaintiff's request for reconsideration. Given this background a private bill was introduced in the Senate to relieve plaintiff of his reimbursement liability. The bill was allowed to die after the General Counsel of the U.S. Department of Transportation recommended rejection. Plaintiff then brought the instant action in this court. Defendant counterclaimed for the remaining balance owing from the $3079.88 'advance' erroneously paid plaintiff.

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[1] Plaintiff's actual expenses for the move totalled $3041.10. Defendant was entitled to at least a $38.78 reimbursement ($3079.88 advance less $3041.10 actual expense).

Of the $3041.10 remaining in dispute, plaintiff's instant action must embrace a money damage claim. *United States* v. *King*, 395 U.S. 1 (1969). Therefore, plaintiff's suit is limited to the portion of the $3041.10 repaid to defendant. Such repayments commenced October 15, 1972, and amounted to $23.69 per paycheck. Plaintiff cannot obtain a judgment that he may retain funds not yet repaid to defendant as this would constitute an impermissible declaratory judgment. The record does not disclose precisely how much has been repaid to date.

"Defendant now moves for summary judgment, contending that there is no factual dispute and, as a matter of law it is entitled to summary judgment in its favor. Plaintiff enters a cross-motion for summary judgement. Upon consideration of the parties' motions, briefs and after oral argument, we hold for defendant.

"The crux of the instant controversy centers on plaintiff's legal entitlement to receive payment for lodging, subsistence and home purchase expense in connection with his transfer. If plaintiff were legally entitled to the payments, defendant's decision to recover the "advance" was improper. If, on the other hand, plaintiff was not legally entitled to the payments, the original promises to pay were made by defendant's agents acting without authority and plaintiff may not win. The United States is not bound where its agents act without authority. *Porter* v. *United States*, 204 Ct. Cl. 355, 366, 496 F. 2d 583, 590 (1974), *cert. denied*, 420 U.S. 1004 (1975). Therefore, the crucial question in the instant fact situation resolves into whether the statutes and regulations in effect at the time of plaintiff's 1972 transfer authorized payment of the lodging, subsistence and home purchase expenses. Clearly the statutes and regulations did *not* so provide.

"The 'legal chain' which denies plaintiff a right to the travel payments in question is set out in Comp. Gen. Dec. B–177277, *supra*. The basis of any FAA authority to pay plaintiff's travel expenses stems from 49 U.S.C. § 1344(a)(6) (1971) (originally enacted August 23, 1958). This statute permits the FAA administrator to pay allowances and benefits to FAA employees stationed abroad in a manner comparable to foreign service personnel. In 1959 the FAA Administrator exercised this power by, in effect, making the Foreign Service Regulations applicable to FAA foreign based personnel. FAA, Agency Bull. 59–1 (Jan. 1, 1959). The Foreign Service Regulations (now codified in 22 U.S.C. § 1136 (1970)) in effect at the time of plaintiff's move did not allow payment of lodging, subsistence or home purchase expenses for an employee's travel to or from a foreign duty station. These regulations were made applicable to plaintiff by FAA, Agency Bull. 59–1, *supra*.

"Further, plaintiff knew or should have known of these 'long standing' provisions. The FAA Travel Handbook from at least the June 8, 1970, edition and continuing through the May 17, 1972, edition (No. 1500.13A, released only four months prior to plaintiff's move) clearly spelled out plaintiff's disentitlement to the claimed expenses.

> 4. *APPLICABILITY.* The provisions of this handbook apply to all FAA employees, except as specified in the following subparagraphs.
>
> a. *Employees Assigned To Foreign Areas.* The travel of employees transferred to, or assigned to, posts of duty in Foreign areas is governed by the provisions of the Foreign Service Act of 1946, as amended, or the Foreign Assistance Act of 1961, as amended, contained in Volume 6 of the Foreign Affairs Manual. Therefore, employees traveling to and from a foreign area under one of these acts are not entitled to benefits and allowances described in this handbook. For example, they are not entitled to allowances for expenses incurred in connection with the sale or purchase of real estate or reimbursement for subsistence expense while occupying temporary quarters. * * * [FAA, Travel Handbook No. 1500.13A, Ch. 1, § 1, Para. 4a (1972)].

Since the regulations specifically provided that the Foreign Service Acts, not the general FAA regulations, applied to plaintiff's 1972 transfer, it should have been apparent to plaintiff that he was not entitled to receive the travel expenses at issue in the instant case. Any promises by defendant's agents contrary to these statutes and regulations did not bind defendant to pay the expenses as they were beyond the scope of the agents' authority.

"However, plaintiff makes a multi-phased argument that he should receive the payments despite the provisions of the statutes and regulations discussed above. First, he implies that notwithstanding statutes or regulations to the contrary, having led plaintiff to incur the expenses by its promises to pay, defendant should now be estopped to assert that the promises were invalid. Second, plaintiff asserts that 5 U.S.C. § 5724(a)(1970) authorized the FAA to make the travel payments. Third, since he signed the travel agreement

plaintiff argues that such agreement contractually bound defendant to pay the travel expenses. Fourth, plaintiff claims entitlement to the payments under the provisions of the FAA Travel Handbook. Finally, he attempts to use the provisions of the Foreign Affairs Manual to justify his claim for the payments.

"We reject each of these contentions.

"First, the principle of estoppel does not operate to bind the Government. *Putnam Mills Corp.* v. *United States*, 202 Ct. Cl. 1, 9, 479 F. 2d 1334, 1338 (1973); *California-Pacific Utilities Co.* v. *United States*, 194 Ct. Cl. 703, 720 (1971).

"Second, the statute upon which plaintiff relies, 5 U.S.C. § 5724(a) (1970), is merely a general statute authorizing the FAA to make travel payments for transfers within the United States. This general provision is overridden by 49 U.S.C. § 1344(a)(6) (1970), *supra*, Agency Bull. 59–1, *supra*, and FAA Travel Handbook No. 1500.13A, *supra*.

"Third, the travel agreement upon which plaintiff relies as a binding contractual agreement creates no vested rights. The agreement is made to prevent the instance where the Government pays an employee's travel expenses only to lose the value of the employee's future performance. The agreement cannot be construed as granting plaintiff any rights not otherwise given to him by the statutes or regulations. Nor has plaintiff cited any authority for such a proposition.

"Fourth, plaintiff cannot rely on the provisions of the FAA Travel Handbook because his situation is clearly exempted. See, FAA Travel Handbook No. 1500.13A, Ch. 1, § 1, Para. 4a (1972).

"Finally, plaintiff may not use the provisions of the Foreign Affairs Manual. The only section which he cites as providing for reimbursement also clearly prevents plaintiff from recovering any such payments. Payment is not permitted where 'either the old or new duty station * * * [is] located outside the coterminous United States.' Foreign Affairs Manual, Vol. 6, Pt. 4, § 2–4.1c(3).

"In short, plaintiff was not legally entitled to receive the travel payments at issue here. Any promises by defendant's agents to make the payments were outside the scope of their authority and therefore did not bind defendant. Defendant

is not estopped to deny the authority of its agents. Neither the provisions of 5 U.S.C. § 5724(a), the travel agreement, the FAA Travel Handbook nor the Foreign Affairs Manual compel payment of the travel expenses to plaintiff in the instant case.

"Accordingly, it is therefore ORDERED that defendant's motion for summary judgment is granted, plaintiff's cross-motion for summary judgment is denied, the petition is dismissed and judgment is granted for defendant on its counterclaim. The case is hereby remanded to the trial division for determination of the amount due defendant on its counterclaim pursuant to Ct.Cl. Rule 131(c).[2]"

Plaintiff's motion for rehearing was denied May 28, 1976.

No. 181–75. MARCH 26, 1976

George B. Forster and Doyle C. Marshall, on behalf of themselves and all others similarly situated

Civilian pay; postal employees; overtime pay; equal protection.—On March 26, 1976 the court entered an order (amended pursuant to order entered May 28, 1976) as follows:

Before DAVIS, *Judge*, Presiding, SKELTON and KASHIWA, *Judges*.

"This case comes before the court on cross-motions for summary judgment. Plaintiffs are retired postal inspectors who seek payment for uncompensated overtime. They contend they were denied equal protection because other Civil Service employees are compensated for overtime. Both prior to and subsequent to the Postal Reorganization Act of 1970, postal inspectors were paid on the basis of a 48-hour week instead of overtime pay.

"The postal field service, of which plaintiffs were a part, is properly classified as a separate entity for compensation purposes. It is unique, a fact long recognized by Congress.

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[2] The court is mindful of the Government's attempt at cooperation with plaintiff in offering to allow return of the mistakenly paid "advance" through payroll deductions over a five-year period. We assume the same considerations of fairness will obtain in any appropriate use of the judgment awarded defendant on its counterclaim.

The exclusion of the postal field service from application of Title 5 premium pay provisions is based upon a reasonable appreciation of this uniqueness. Only an invidious discrimination violates equal protection. *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); *Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483, 489 (1955). There is no such discrimination here.

"IT IS ORDERED that defendant's motion for summary judgment is granted, plaintiffs' motion for summary judgment is denied, and plaintiffs' petition is dismissed."

On August 25, 1976 plaintiffs filed a petition for writ of certiorari.

No. 202–75. MARCH 26, 1976

Norman B. Wright

Military pay; Reserve Officers' Training Corps; commissioning of officers; authority of President; discretion.—On March 26, 1976 the court entered the following order:

Before COWEN, *Chief Judge*, SKELTON and KASHIWA, *Judges*.

"Plaintiff seeks a commission as a reserve officer in the United States Air Force, which he alleges was earned by him through his participation in the Air Force Reserve Officers' Training Corps program.

"It is uncontroverted that plaintiff never completed the academic and military requirements of the course of advanced military training under the Air Force ROTC program at San Diego State College. He was disenrolled from that program prior to completion. Under 10 U.S.C. § 2106(a) (1970) it is clear that plaintiff's eligibility for a commission as an officer in the Air Force Reserve is contingent upon his 'satisfactorily completing the academic and military requirements of the program of advanced training.' Since plaintiff was disenrolled from the program prior to completion, we find that he was not even eligible for a commission.

"In any event, even if plaintiff had completed the program, we hold that he could show no entitlement as a matter of right to an Air Force commission. One who completes the ROTC program '*may be* appointed as a regular or reserve

officer * * *.' 10 U.S.C. § 2106(a) (1970). [Emphasis supplied.] Further, 10 U.S.C. § 593(a) (1970) states:

> (a) Appointments of Reserves in commissioned grades below general officer and flag officer, except commissioned warrant officer, *shall be made by the President alone.* Appointments of Reserves as general and flag officers shall be made by the President, by and with the advice and consent of the Senate, except as provided in section 3352 of this title. [Emphasis supplied.]

"In *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), the Court stated:

> It is obvious that *the commissioning of officers* in the Army is a *matter of discretion* within the province of the President as Commander in Chief. Whatever control courts have exerted over tenure or compensation under an appointment, *they have never assumed by any process to control the appointing power either in civilian or military positions.* [At p. 90. Emphasis supplied.]

"In *Schlesinger* v. *Ballard*, 419 U.S. 498, 510 (1975), a failure-of-selection case, the Court held:

> * * * This Court has recognized that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *Toth* v. *Quarles*, 350 U.S. 11, 17. See also *Orloff* v. *Willoughby*, 345 U.S. 83, 94. The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress, see United States Constitution, Art. I, § 8, cls. 12–14, and with the President. * * *

We also quote from *Goldstein* v. *United States*, 131 Ct. Cl. 228, 232, 130 F. Supp. 330, 332, *cert. denied*, 350 U.S. 888 (1955), where this court stated:

> * * * Nor can this court undertake to grant plaintiff promotions or assignments which the Army having jurisdiction over him decided not to make. * * *

See *Norman* v. *United States*, 183 Ct. Cl. 41, 392 F. 2d 255 (1968), *cert. denied*, 393 U.S. 1018 (1969); *Donnelly* v. *United States*, 133 Ct. Cl. 120, 134 F. Supp. 635 (1955); *Chase* v. *United States*, 159 Ct. Cl. 610 (1962); *Johnson* v. *United States*, 150 Ct. Cl. 747, 280 F. 2d 856 (1960), *cert. denied*, 365 U.S. 882 (1961). This case is squarely controlled by the rule of *Orloff* v. *Willoughby*, and plaintiff's petition

must be dismissed. If this court lacks the power to promote an officer, it surely lacks the power to appoint one.

"Plaintiff argues that the Category Agreement and Statement of Understanding executed on January 27, 1972, constitute a binding commitment by the Air Force to tender him a reserve commission. We hold that plaintiff does not have a *contractual* right to either retention in the ROTC program or a commission in the Air Force Reserve. See *Birt* v. *United States*, 180 Ct. Cl. 910, 913 (1967); *Bell* v. *United States*, 366 U.S. 393, 401–402 (1961); *Deschler* v. *United States*, 203 Ct. Cl. 477, 485 (1974); *Waller* v. *United States*, 198 Ct. Cl. 908, 913, 461 F. 2d 1273, 1276 (1972).

"We allow defendant's motion for summary judgment and deny plaintiff's motion for summary judgment.

"IT IS THEREFORE ORDERED that plaintiff's petition be and is hereby dismissed."

On May 28, 1976 the court denied plaintiff's motion for rehearing and amendment of the Order.

No. 205–75. MARCH 26, 1976

Merchants National Bank & Trust Company of Indianapolis, a National Banking Association

Court of Claims jurisdiction; conversion of assets in violation of security agreement.—On March 26, 1976 the court entered the following order:

Before COWEN, *Chief Judge*, SKELTON and KASHIWA, *Judges*.

"This case comes before the court on defendant's motion to dismiss the petition and plaintiff's opposition thereto. On the basis of facts which plaintiff has alleged and defendant has admitted for the purposes of its motion to dismiss, the court finds:

"(1) On May 11, 1971, Ours, Inc., granted plaintiff a security interest in Ours' inventory and the proceeds of its inventory. Ours agreed to segregate the proceeds of the inventory from its own assets and transmit them daily to plaintiff.

"(2) On February 14, 1973, Ours, Inc., executed a second security agreement in all of Ours' inventory, contract rights, accounts receivable, and other collateral, and in the proceeds from such collateral. Ours also agreed to deposit all the proceeds in a special collateral account and to hold all remittances in trust pending deposit in the collateral account. Both of plaintiff's interests were perfected by filing financing statements with the Secretary of State of Indiana.

"(3) By means of the two agreements, plaintiff obtained a perfected security interest in Ours' inventory and both a security interest and a right to possession of the proceeds of the inventory and all other forms of intangible personal assets belonging to Ours. Plaintiff also obtained the right to repay itself from the assets and proceeds which were subject to its security interest and were in its possession. Ours was under a legal duty to turn over possession of the proceeds and intangible assets immediately upon their receipt.

"(4) On August 30, 1974, Ours opened an account at the Indiana National Bank and deposited proceeds from the secured property in the account in derogation of the trust and security agreements. On September 3, 1974, plaintiff sent notice to the District Director of Internal Revenue for the Indiana District, describing its security interest in the assets of Ours and advising the District Director not to cash checks drawn on the Ours account. Thereafter, Ours drew funds from the account and paid the United States past-due F.I.C.A. and withholding taxes, amounting to about $11,000.

"(5) Plaintiff brought this suit to recover the $11,000 from the United States on the ground that the secured proceeds are subject to the trust interest of the secured party, as long as they may be traced and identified, and that defendant took the proceeds subject to the equitable trust interests of plaintiff. Plaintiff also contends that this is a suit for the recovery of liquidated damages against the United States within the meaning of Title 28 U.S.C. § 1491. Plaintiff acknowledges that this is not a suit for the refund of taxes paid or an action upon an express or implied contract against the United States. Defendant contends that under the facts stated above, plaintiff's claim is a tort action for conversion and one which is not within the jurisdiction of this court.

"Upon consideration of the foregoing, the court concludes as a matter of law that plaintiff's claim sounds wholly in tort and is not within the jurisdiction of the Court of Claims. Under Indiana law and under the law of trusts generally, Ours, Inc., converted plaintiff's assets when it paid them to the Government in violation of the security agreements. When the Government accepted payment from the converted assets after receiving notice of plaintiff's interest therein, it converted plaintiff's property. *Porter* v. *Roseman*, 165 Ind. 255, 74 N.E. 1105 (1905); *Peoples State Bank* v. *Caterpillar Tractor Co.*, 213 Ind. 235, 12 N.E. 2d 123 (1938). *See also* W. Prosser, *The Law of Torts* 84–85, 87–91 (4th ed. 1971); A Scott, *The Law of Trusts* § 470 (3rd ed. 1967); G. Bogert, *The Law of Trusts and Trustees* § 476 (2d ed. 1960).

"Without making any determination as to whether the district court has jurisdiction of plaintiff's claim, the court has decided that this is an appropriate case for transfer to the U.S. District Court for the Southern District of Indiana pursuant to the provisions of Title 28 U.S.C. § 1506.

"IT IS THEREFORE ORDERED that this case and all papers filed therein shall be transferred by the clerk of this court to the U.S. District Court for the Southern District of Indiana."

No. 128–72. APRIL 2, 1976

Herman R. Testan and Francis L. Zarrilli

On April 2, 1976 the court entered the following order in this case:

"This case comes before the court on decision and remand of the Supreme Court, filed March 31, 1976, that court having on March 2, 1976, rendered an opinion [424 U.S. 392] reversing the judgment entered in this court on July 19, 1974, and remanding the case to this court 'with directions to dismiss the respondents' petition.' Upon consideration thereof,

"IT IS ORDERED this 2nd day of April, 1976, that in conformity with the decision and remand of the Supreme Court, filed in this court on March 31, 1976, the judgment heretofore entered on July 19, 1974 [205 Ct. Cl. 330, 499 F. 2d 690] be and the same is vacated and withdrawn.

"IT IS FURTHER ORDERED that plaintiffs' petition be and the same is dismissed."

No. 54–74. APRIL 9, 1976

John Billmeyer, Trustee in Bankruptcy of the Estate of Inter-Helo, Inc.

Contracts; interpretation.—On March 25, 1976 there was filed in the court the decision of the Interior Board of Contract Appeals of December 1, 1975 on remand by this court's order of May 10, 1975 (reported in full at 207 Ct. Cl. 953–54). The decision reaffirmed the Board's earlier denial of the contractor's appeal in the light of additional evidence considered by the Board pursuant to the court's order. On April 9, 1976 the court entered an order dismissing the petition with prejudice based upon plaintiff's acceptance of the decision of the Board.

No. 146–76. APRIL 9, 1976

William David Lerman

Court of Claims jurisdiction.—On April 9, 1976 the court, *en banc*, entered the following order:

"This case comes before the court on plaintiff's 'petition to proceed in forma pauperis in suit for damages' and plaintiff's 'notice of action and affirmation suit for damages', both duly signed and sworn to by plaintiff on March 7, 1976, wherein plaintiff seeks, among other things, 'to move this court, to issue an order for damages based upon the grounds that my civil rights were violated and invaded, and that a conspiracy to interfere with my civil rights has transpired, pursuant to Sections 1983 and 1985 of Title 42' and 'an award for the damages and deprivation incurred in the minimum amount of thirty-six million dollars, and further damages also sought are: exemplary, punitive, compensatory and declaratory damages, as well as injunctive relief'. The gravamen of plaintiff's complaints relates to alleged conspiratorial, negligent and malicious acts and treatment directed toward and against plaintiff by guards and employees of the Bureau of Prisons while plaintiff has been incarcerated after convic-

tion for crimes which are contended by plaintiff to, among other things, 'amount to a deprivation of a constitutionally protected right, such as freedom from the infliction of cruel and unusual punishment and equal protection of the law'. Although not material to the disposition of plaintiff's petition in this court, it does not appear that any acts or treatment complained of by plaintiff amounted to physical violence or resulted in physical or bodily harm or injury to his person.

"Upon consideration of plaintiff's petition, without oral argument, it is concluded that if the petition asserts any valid claim for relief such relief sounds in tort and therefore the petition does not state a claim for relief which is within the jurisdiction of this court.

"IT IS THEREFORE ORDERED that plaintiff's petition (motion) to proceed in forma pauperis is granted and leave is given to file the petition this date without prepayment of the cost required by the Rules of the court and with 'The United States' to be deemed the sole defendant in this court.

"IT IS FURTHER ORDERED that plaintiff's petition, having been filed, is hereby dismissed as alleging a claim or claims not within the jurisdiction of this court."

No. 866–71. APRIL 16, 1976

Florence S. Wilson

Civilian pay; overseas teacher; excepted appointment as a time-limited employee; United States Dependents School System, European Area; educational requirements.—Plaintiff, having been appointed by the United States Dependents School System, European Area, effective January 6, 1969, to the position of kindergarten teacher, the notice of personnel action stating that it was an excepted appointment not to exceed June 11, 1969, seeks to recover back pay from June 11, 1969 to August 24, 1970 when she was rehired. Plaintiff alleges that termination of her employment and the Government's failure to retain her as a kindergarten teacher was, under the circumstances of this case, arbitrary and capricious. This case has been before the court previously on motions for summary judgment (see 203 Ct. Cl. 676, 492 F. 2d

1190) which were denied on the ground that there were unresolved factual issues between the parties, most particularly with respect to whether or not plaintiff was misled to believe she was a fully qualified employee and whether there was an unreasonable delay, caused by the Government, in not informing plaintiff that she lacked the required education courses for the teaching position. The case was remanded to the trial division. On November 21, 1975 Trial Judge Philip R. Miller filed a recommended decision concluding, for the reasons given, that plaintiff is not entitled to recover. This case again came before the court on defendant's motion moving that the court adopt the recommended decision, plaintiff having failed to file a notice of intention to except thereto and the time for so filing having expired. Upon consideration thereof, without oral argument, since the court agrees with the decision, on April 16, 1976, by order, the court granted defendant's motion and adopted the recommended decision as the basis for its judgment in this case, concluded that plaintiff is not entitled to recover, and dismissed the petition.

No. 377–72. APRIL 16, 1976

Wilmington Trust Company, Executor of the Estate of Pauline du Pont Dean

Taxes; income tax; deductions; losses; transaction entered into for profit; acquisition and disposition of stock; profit motive.—Plaintiff, as executor of the estate of Pauline du Pont Dean, seeks to recover an amount, plus interest, representing the disallowance by the Internal Revenue Service of a long-term capital loss claimed by plaintiff on 1965 transfers by the estate of shares of stock of a personal holding company to decedent's children and to a trust. On January 9, 1976 Trial Judge Mastin G. White filed a recommended decision (reported at 37 AFTR 2d 76–563 and 76–1 USTC para. 9163), concluding that when plaintiff disposed of the shares of stock it intended to make a profit on the disposition, and that, although the profit intention was coupled with a nonprofit motive of satisfying loans made to pay taxes and debts owed by the estate, where a retroactive increase in the value of the stock resulting from a compromise settlement of litiga-

tion over the estate tax retroactively increased plaintiff's basis in the stock for disposition purposes, the unexpected loss was incurred in a transaction entered into for profit, and plaintiff was entitled to deduct the amount of the loss for income tax purposes under Sec. 165(c) of the Internal Revenue Code of 1954. On April 16, 1976 the court, by order, adopted the recommended decision as the basis for its judgment in this case, concluded that plaintiff was entitled to recover, and entered judgment for plaintiff against defendant with the amount thereof to be determined pursuant to Rule 131(c)(2). On June 18, 1976, pursuant to the foregoing order, a memorandum report of the trial judge and a stipulation of the parties, judgment was entered for plaintiff for $56,756.25, plus interest as provided by law.

No. 297–72. APRIL 16, 1976

Basil B. Finney

Patents; infringement.—On April 16, 1976 the court entered the following order:

Before COWEN, *Chief Judge*, NICHOLS and KUNZIG, *Judges*.

"Plaintiff, Basil B. Finney, brought this suit under 28 U.S.C. Sec. 1498, to recover reasonable and entire compensation for infringement by National Aeronautics and Space Administration (NASA) of plaintiff's patent No. 3,368,811. Trial Judge Colaianni has filed a recommended decision and conclusion of law in accordance with Rule 134 (h) [reported at 188 USPQ 33]. The plaintiff has filed pro se his exception and request for review. Upon consideration of this, and of defendant's motion for judgment, but without oral argument, the court agrees with the recommended decision, which has been furnished to the parties, and adopts the same as the basis for its judgment in this case. There was, therefore, no infringement, and the issue of invalidity is not addressed.

"The invention teaches a method for constructing an interlocking glove and handle, enabling a secure, nonslip grasp of a handle or control wheel. Velcro, a trademarked material, may be applied to both glove and handle, with numerous hooks protruding from one surface and loops of thread from the other. Plaintiff on a tour of the NASA Center in Hous-

ton, Texas, in 1970, saw a gloved mannequin holding an air-gun, the glove and gun being treated with Velcro in the patented manner. However, this mannequin was believed to depict a Gemini IV mission astronaut. The Gemini IV mission was run on June 3–7, of 1965, three years before the patent date, and according to testimony, did not actually employ Velcro. The evidence was specific and overwhelming that, with one exception, NASA made no use of the invention. The exception is that in a single instance NASA designed and built a Modular Equipment Transporter (MET), sort of a glorified wheelbarrow, for use on the moon. It was tried (on earth) with Velcro nonskid material on the handles and on the astronaut's gloves, but this MET was rejected for another design, not using Velcro, that was actually used on the moon. Plaintiff makes much of this single instance, but the trial judge properly rejects it as *de minimis*. *Maxon Premix Burner Co.* v. *Eclipse Fuel Engineering Co.*, 471 F. 2d 308, 317 (7th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973). (Manufacture and sale of a single experimental prototype held *de minimis*.) An inventor cannot complain of experiment with his invention on this modest scale, when it is not followed by practical use. Plaintiff believes this experimental MET embodying his invention is still in Government storage somewhere, and so it well may be, but there is nothing to suggest it is stored for actual use, on the moon or elsewhere.

"Accordingly, the plaintiff is not entitled to recover and the petition is dismissed."

No. 124–73. APRIL 16, 1976

Ed Smithback Plumbing, Inc.

No. 125–73. APRIL 16, 1976

Edward D. Smithback and Mary Smithback

Taxes; income tax; stockholder's gross income, exclusions from; corporate ordinary and necessary business expense deductions; medical expense payments to stockholder; constructive dividends; salary payments to shareholder; collateral estoppel; cash v. accrual basis method of accounting.—

In these consolidated cases plaintiffs seek to recover Federal income taxes and interest paid for fiscal years ending March 31, 1966, 1967 and 1968, and for calendar years 1965, 1966 and 1967, respectively. A common issue is whether payments by the corporation of personal medical expenses of Edward D. Smithback and his family during the taxable years are excludable from gross income during those years under Sec. 105 of the Internal Revenue Code of 1954 and are deductible by the corporation as ordinary and necessary business expenses under Sec. 162(a) of the Code for its fiscal years. The Commissioner of Internal Revenue denied the applicability of Sec. 105 to the medical expense payments, considered them constructive dividends, and included the payments in the individuals' gross income, and disallowed the deductions of the same payments by the corporation. In a recommended decision filed December 19, 1975 (reported in full at 76–1 USTC para. 9139 and 37 AFTR 2d 76–486), Trial Judge Thomas J. Lydon concluded that the plan whereby the corporation would pay the medical expenses of Mr. Smithback and his family had for its purpose and was designed to benefit him in his capacity as shareholder-owner of the business rather than in his capacity as an employee of the corporation, and accordingly the payments must be considered constructive dividends paid by the corporation to him; that plaintiffs are collaterally estopped from relitigating in these cases the medical expense payment issue decided against them in the prior Tax Court case; that the salary payments to Mr. Smithback during a period when he was ill were not made pursuant to any identifiable wage continuation plan; and that Mr. Smithback is considered to have filed his Federal income tax returns on the cash method of accounting for the tax years in issue. On April 16, 1976 the court entered the following order:

Before COWEN, *Chief Judge*, NICHOLS and KUNZIG, *Judges*.

"These consolidated cases come before the court on defendant's motion, filed February 5, 1976, moving that the court adopt, with modifications, the recommended decision, filed December 19, 1975, by Trial Judge Thomas J. Lydon, pursuant to Rule 134(h), as the basis for its judgment in this case, plaintiff having filed no exceptions thereto and the

time for so filing pursuant to the Rules of the court having expired. Upon consideration thereof, without oral argument, it appears that defendant had a counterclaim against the plaintiff corporation for $39.56 plus interest and penalties. The defendant failed to submit findings or to brief its counterclaim and the trial judge concluded and reports that it was abandoned. Defendant asserts that this failure was inadvertent and moves to adopt the recommended decision with modifications as to Findings 20 and 24 and to the conclusion of law so as to award judgment for defendant on the counterclaim in the sum of $39.56, plus interest according to law. The court concludes that defendant's failure is a clerical mistake within the provisions of Rule 152(a) and since the court agrees with the trial judge's recommended decision (copies of which have been furnished to the parties), with the modifications requested by the defendant in its motion of February 5, 1976, which motion is hereby granted,

"IT IS CONCLUDED AND ORDERED that plaintiffs are not entitled to recover on their petitions, that defendant is entitled to recover on its counterclaim; that judgment is entered for defendant on its counterclaim against Ed Smithback Plumbing Inc., only, in the sum of $39.56, plus interest according to law; and, that plaintiffs' petitions are dismissed."

No. 226–73. APRIL 16, 1976

Thomas R. Fadell and Barbara G. Fadell

Taxes; suit for tax refund; adequacy of administrative claim for refund.—On April 16, 1976 the court entered the following order:

Before SKELTON, *Judge*, Presiding, KASHIWA and BENNETT, *Judges*.

"This case comes before the court on defendant's motion for partial summary judgment on plaintiffs' assertions (1) that the Commissioner of Internal Revenue erroneously disallowed business expense deductions of $863.04 and (2) that plaintiffs erroneously overstated their gross income by $522.80. On August 4, 1966, plaintiffs filed a timely claim

for refund which gave the following as their ground for recovery:

> The Internal Revenue Service erroneously attributed all the bank deposits of the claimant to current gross income. In excess of $4,500.00 of bank deposits were not current gross income to claimants, but consisted of clients' monies, re-deposit of funds, gifts, re-payment of loans, etc.

This does not refer to the claims mentioned above.

"The Internal Revenue Code of 1954, § 7422(a), provides that no suit for refund shall be maintained until a claim for refund has been filed according to regulations. Treas. Reg. § 301.6402-2(b)(1) (1954) provides that

> * * * The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. * * *

Plaintiffs did not comply with this regulation for the grounds at issue here. This court held in *Estate of McCabe* v. *United States*, 201 Ct. Cl. 243, 246, 475 F. 2d 1142, 1144 (1973):

> * * * True, plaintiff demanded, in both its claim for refund and in its petition in this court, the entire amount of the deficiency which had been assessed and paid, an amount which would be refundable only if the widow's allowance were a proper deduction. Numbers alone, however, cannot satisfy the rule that a claim for refund must set out the grounds upon which it rests. * * *

See *Union Pacific R.R.* v. *United States*, 182 Ct. Cl. 103, 108, 389 F. 2d 437, 442 (1968). Upon the foregoing reasons

"IT IS ORDERED that defendant's motion for partial summary judgment is granted and plaintiffs' petition is dismissed as to the claims set out in defendant's motion."

No. 322-73. APRIL 16, 1976

Hugh J. Hyde

Civilian pay; overtime pay; wage board employee; standby or on-call status.—Plaintiff seeks compensation under 5 U.S.C. § 5544(a) for time spent in excess of his regular employment hours as a Duty Security Officer at a

naval research station. In a recommended decision filed November 10, 1975, Trial Judge Charlotte P. Murphy concluded that plaintiff was within the confines of his station and confirmed his "standby" status, and that plaintiff is entitled to overtime pay, in the amount of $33,836.17 for the uncompensated time he was required to remain within the confines of his post of duty in a standby or on-call status during the period August 22, 1967 to April 1, 1972. Upon consideration of the trial judge's decision, together with defendant's proposed modifications and plaintiff's response thereto, without oral argument, on April 16, 1976 the court entered an order concluding that said decision should be adopted as the basis for its judgment in this case, with defendant's requested modifications, granting defendant's motion and affirming and adopting the said decision with the following modifications:

Page 10, delete lines 7–22

Page 11, delete all of page 11 including footnotes 6 and 7

Page 12, delete lines 1–14, and substitute for lines 10–14 the following:

As will be discussed, *infra*, the facts adduced at trial established that while performing DSO duty plaintiff's whereabouts were narrowly limited and his activities substantially restricted. Hence, there is no need to decide the question of whether the Navy's regulation must be read as requiring that plaintiff's whereabouts be narrowly limited and his activities substantially restricted in order to determine whether he was in a compensable standby status within the meaning of 5 U.S.C. § 5544. Since plaintiff was within the confines of his station under the Navy regulation even as interpreted by defendant, his "standby" status is confirmed

Page 15, renumber footnotes 8 through 11 as 6 through 9, respectively

Page 16, renumber footnotes 12 and 13 as 10 and 11, respectively

Page 17, renumber footnotes 14 and 15 as 12 and 13, respectively

Page 18, renumber footnote 16 as 14

Page 19, delete lines 5–8 and substitute the following: schedule employees. Since plaintiff meets the stringent criteria established by the CSC, he also meets the criteria

of the Navy regulation as interpreted by defendant. Accordingly, he is entitled to compensation.

No. 394–73. APRIL 16, 1976

Alfred Leggoe, Jr.

Civilian pay; reduction-in-rank; performance rating requirements.—On April 16, 1976 the court issued the following order:

Before COWEN, *Chief Judge*, NICHOLS and KUNZIG, *Judges*.

"This civilian pay case comes before the court on the parties' cross-motions for summary judgment. Plaintiff contests his September 16, 1973, reduction-in-rank from GS–14 Supervisory Electronic Engineer to GS–12 Electronic Engineer. Plaintiff seeks to recover the difference in pay between GS–14 and GS–12 and also requests restoration to the GS–14 position. We hold for defendant and find as follows:

"On April 12, 1973, plaintiff received a letter of warning for unsatisfactory performance and on July 12, 1973, he was given an unsatisfactory performance rating covering the period March 16, 1972 to March 15, 1973. Plaintiff appealed this rating through administrative channels and it was ultimately sustained by the Statutory Performance Rating Board on January 23, 1974. In the meantime, defendant initiated procedures necessary to demote plaintiff based on the unsatisfactory performance rating. It sent plaintiff a reduction-in-rank letter on August 30, 1973. Plaintiff appealed the demotion to the New York Regional Office, Civil Service Commission (CSC). The N.Y. Region sustained plaintiff's reduction on May 6, 1974. Later, on September 17, 1974, the CSC Appeals Review Board (ARB) sustained the N.Y. Region. Plaintiff then brought the present action.

"Defendant entered a motion for summary judgment contending: (1) this court has no jurisdiction over the unsatisfactory performance rating, (2) no procedural errors were made when defendant imposed the unsatisfactory rating, (3) the Agency and the CSC complied with all procedural requirements in demoting plaintiff, and (4) the decision of the ARB sustaining plaintiff's reduction-in-rank was not arbitrary or capricious and was supported by substantial

evidence. Plaintiff then filed a cross-motion for summary judgment. The crux of plaintiff's position is that the unsatisfactory performance rating was defective due to defendant's failure to follow its own regulations. Since this defective rating provided the basis for plaintiff's reduction, plaintiff argues, the demotion must be voided.

"The only aspect of defendant's conduct attacked by plaintiff in the instant case centers on use of an allegedly defective performance rating to reduce plaintiff. Because the rating *was not* defective, we hold for defendant.[1]

"Plaintiff's defective performance rating argument is based upon a deep-seated misunderstanding of the applicable regulations. Plaintiff claims that the rating was defective because it was not received within ninety days of the end of the rating period. He cites Naval Air Station (Lakehurst, N.J.) Instruction (NAS Instr.) 12430.2B9 (1964) as authority. However, this regulation is inapplicable to plaintiff's problems in the instant case. It relates *solely to warning requirements*. An employee may not be rated 'unsatisfactory' until he has received a 'ninety-day' warning and has been given 'a reasonable opportunity to demonstrate satisfactory performance.' NAS Instr. 12430.2B9a.[2]

"In the instant situation, plaintiff received his warning letter on April 12, 1973, less than a month after the end of the rating period. Although the warning was not given before the end of the rating period, no regulation cited by plaintiff so required. Defendant complied with the regulations by giving plaintiff the required ninety days to improve his performance. When plaintiff demonstrated no improved per-

[1] Plaintiff cannot prevail on the performance rating arguments. We therefore find it unnecessary to address defendant's jurisdiction and CSC procedure arguments.

[2] NAS Instr. 12430.2B9 provides in pertinent part:

9. *Warning Requirements:*

a. No employee shall be rated unsatisfactory without a ninety-day warning and a reasonable opportunity to demonstrate satisfactory performance.

e. A performance rating warning may be given at any time after compliance with the prerequisites to formal warning stated above. A warning given less than ninety days preceding the close of the rating period extends the rating period sufficiently to allow the full ninety-day warning period before the rating is due to be made. The warning may be renewed, if warranted, provided the rating period is not extended more than 90 days beyond the regular rating date.

formance in this time period, defendant properly issued the 'unsatisfactory' rating.

"Plaintiff does not attack the substance of his rating. He only alleges that it was invalid because it was not issued within ninety days of the end of the rating period. However, he cites no regulation which compelled defendant to issue the rating within this time frame. We, therefore, uphold defendant's issuance of the rating and the subsequent reduction-in-rank as proper under the applicable regulations and statutes.

"In short, in this action plaintiff attacks an 'unsatisfactory' performance rating and his reduction-in-rank based on the rating. The sole basis for this attack is that the rating was invalid because it was not timely issued. However, plaintiff has been unable to cite any support for such a proposition. From all that appears in the record, the rating and the reduction-in-rank complied with applicable statutes and regulations.

"Accordingly, IT IS HEREBY ORDERED, upon consideration of the parties' cross-motions for summary judgment together with the briefs and documentary exhibits, without oral argument, that defendant's motion for summary judgment is granted, and plaintiff's cross-motion for summary judgment is denied. The petition is dismissed."

No. 193–74. APRIL 16, 1976

Aerojet General Corp., Et Al.

Contracts; cost principles; termination for convenience; subcontractor claims.—Plaintiff (the prime contractor) seeks review of the decision of the Armed Services Board of Contract Appeals rejecting its petition concerning the amount of reimbursable costs it should receive on account of a subcontract terminated for the Government's convenience. The prime contractor argued before the Board that all costs which the prime had acknowledged as being allocable to the terminated subcontract represented, in turn, the measure of cost which it was entitled to receive in reimbursement from the Government. Since the Board rejected this argument, it left the prime in the position of having to absorb that por-

tion of the subcontractor's costs for which the prime had acknowledged liability but which the Government, after audit, declined to pay. On January 30, 1976 Trial Judge John P. Wiese filed a recommended decision (reported in full at 22 CCF para. 80,022) concluding that the Board properly rejected the prime's argument. This case came before the court on defendant's motion requesting that the court adopt the recommended decision on plaintiff's and defendant's motions for summary judgment, plaintiff having failed to file a request for review and the time for so filing having expired. Upon consideration thereof, without oral argument, since the court agrees with the recommended decision, on April 16, 1976 it granted defendant's motion and adopted the recommended decision as the basis for its judgment in this case, denied plaintiff's motion for summary judgment, granted defendant's cross motion and dismissed the petition.

No. 346–74. APRIL 16, 1976

Man Kwong Au, et al.

Taxes; income tax; exempt organizations; cemetery company.—On April 16, 1976 the court entered the following order:

Before SKELTON, *Judge*, Presiding, KASHIWA and BENNETT, *Judges*.

"This is a suit for the refund of federal income taxes for 1966, 1967, and 1968 in the amount of $106,443.59. The plaintiffs are trustees of the Diamond Head Memorial Park Association, Ltd., Perpetual Care Fund (the Fund), and they claim that the Fund is exempt from taxation under Section 501(c)(4) or 501(c)(13) of the Internal Revenue Code of 1954. These sections of the Code read as follows:

[Quotes omitted]

The case is before the court on defendant's motion for summary judgment and plaintiffs' opposition thereto.

"Each time a lot is sold by the Diamond Head Memorial Park Association, Ltd., (the Association), a deposit is also made in the Fund, which was formed as a trust. Under the

terms of the trust, the dividend and interest income (but not capital gains) generated by the corpus are regularly paid over to the Association to defray maintenance expenses. Customers of the Association are told that the Fund will help insure perpetual maintenance and care, at least into the foreseeable future. Amounts turned over to the Association by the Fund go into the Association's general operating fund and are simply deposited into its bank account.

"During the years in suit, in addition to the interest and dividend income which was turned over to the Association, the Fund realized long-term capital gains, which were added to the corpus of the Fund. The Internal Revenue Service determined that these amounts should have been reported as income, and it assessed a deficiency against the Fund. The assessments were paid, and the Fund eventually filed this suit, seeking a refund, on the ground that it should be considered exempt from taxation under one or the other of the sections of the Internal Revenue Code quoted above.

"The contentions of the plaintiffs are governed by this court's recent decision in *Trustees of Graceland Cemetery Improvement Fund* v. *United States*, 206 Ct. Cl. 609, 515 F. 2d 763 (1975). In that case, the court held that a perpetual care fund operated in conjunction with a commercial cemetery company could not be considered exempt under Section 501 (c) (13), since it is not, by itself, a separate 'cemetery company,' but merely an adjunct to the profit-making enterprise with which it is associated. In a case of first impression, the court stated that 'where one organization serves as a mere adjunct for a primary organization by providing services which are essential to the functioning of the primary organization and which would normally be performed by it, the adjunct will acquire the tax status of the primary company.' 206 Ct. Cl. at 624. The court also noted that the adjunct theory has been applied to cemetery companies in Rev. Rul. 58–190, 1958–1 Cum. Bull. 15 and in Rev. Rul. 64–217, 1964–2 Cum. Bull. 153. *Id.* at 624. Clearly, this applies to plaintiffs in the present case, and thus the Fund cannot be considered exempt under Section 501 (c) (13).

"As to Section 501 (c) (4), the Fund here is not a 'civic league or organization not organized for profit,' as required

by that section. Under the above analysis, the Fund is nothing more than a part of, or adjunct of, the profit-making Association. Plaintiff's claim must therefore fail under this section of the Internal Revenue Code.

"The defendant's motion for summary judgment is granted and plaintiffs' petition is dismissed."

No. 48–75. APRIL 16, 1976

Louis Zitnick, II

Military pay; discharge under other than honorable conditions; correction of records.—On April 16, 1976 the court entered the following order:

Before COWEN, *Chief Judge*, Presiding, NICHOLS and KUNZIG, *Judges*.

"This case is before the court on cross motions for summary judgment. Both parties have waived oral argument. Plaintiff was discharged under 'other than honorable conditions' because of his 'unauthorized use of narcotics and dangerous drugs' and his 'frequent involvement of a discreditable nature with military authorities.' Plaintiff applied to the Navy Discharge Review Board, requesting that his discharge be upgraded to one under honorable conditions. Plaintiff's application was predicated on a Department of Defense policy change: that administrative discharges under 'other than honorable conditions' were to be reviewed for recharacterization to honorable discharges if issued solely for drug use. The Review Board refused to change plaintiff's discharge. Plaintiff applied to the Board for Correction of Naval Records (BCNR) which denied relief and then filed suit in this court, alleging that the Review Board and the BCNR acted in an arbitrary and capricious manner, in violation of its regulations, and denied him his right to due process of law.

"Plaintiff has failed to show that the BCNR acted in an arbitrary or capricious manner. Plaintiff was not discharged solely for drug use and thus does not fall within the facts contemplated by the policy change. Plaintiff has not overcome the presumption of good faith which attaches to Board actions. He has not been denied due process of law, nor has he shown violation of any regulations.

"Accordingly, upon consideration of plaintiff's motion for summary judgment and defendant's cross motion, it is ORDERED that defendant's motion be granted and that plaintiff's motion be denied. The petition is dismissed."

No. 163–75. APRIL 16, 1976

Audrey L. Richardson

Military pay; discharge; non-selection for reenlistment; right to remain in enlisted service; Air Force Regulations.— On April 16, 1976 the court issued the following order:

Before SKELTON, *Judge*, Presiding, KASHIWA and BENNETT, *Judges.*

"The plaintiff was a first-term enlisted WAF who was honorably discharged on April 20, 1974, about five months before her term of enlistment expired, as a result of her non-selection for reenlistment by the Selective Reenlistment Board (S.R. Board). She was notified by letter on February 11, 1974, that the S.R. Board would meet on March 13, 1974, to consider whether or not she should be allowed to reenlist, since her supervisors had recommended her non-selection for reenlistment because of her apathetic attitude. She was informed that she had until March 1, 1974, to submit any information in her behalf. The plaintiff retained an attorney, who requested copies of her performance record and various other records, which were furnished to him. It developed that certain other documents were furnished to the S.R. Board, which met on March 14, 1974, but copies thereof were not furnished to plaintiff's attorney until April 24, 1974, after the meeting of the S.R. Board. The S.R. Board denied her reenlistment and she was discharged. The plaintiff then filed a petition with the Air Force Board for Correction of Military Records (The Correction Board) claiming that she had been denied due process because she had not been furnished copies of the above-mentioned documents before the S.R. Board meeting. The Correction Board denied relief to the plaintiff and informed her by letter of March 7, 1975, that she had failed to show probable error or injustice in the decision of the Selective Reenlistment Board.

"Plaintiff then filed this suit, alleging that the decision of the Correction Board denying her reenlistment in the Air Force was arbitrary, capricious, in violation of her rights to due process of law and equal protection of the law, and in violation of applicable statutes and regulations of the Executive Branch of the Government. She claims back pay at least to the end of her enlistment period and asks for correction of her records so as to show her right to reenlist. The case is before us on cross-motions for summary judgment. We hold for the Government, because it appears that the Air Force and the Correction Board complied with all applicable laws and regulations.

"Air Force Regulation 31–3 implements 10 U.S.C. § 1552, which authorizes the Secretary of the Air Force to '* * * correct any military record * * * when he considers it necessary to correct an error or remove an injustice.' In accordance with this regulation, plaintiff submitted her application to the Air Force Board for Correction of Military Records in July 1974, and, as stated above, after reviewing plaintiff's military records and the materials submitted by all parties, the Correction Board concluded plaintiff had failed to establish a showing of probable error or injustice.

"In cases of this nature, where arbitrary or capricious action on the part of the Correction Board is alleged, this court has often held that in the absence of cogent and clearly convincing evidence of arbitrary and capricious administrative action, it has no jurisdiction to review the action of military boards of the Secretary in legitimate military matters. *See Furlong* v. *United States*, 153 Ct. Cl. 557 (1961); *Hoen* v. *United States*, 157 Ct. Cl. 235 (1962); *Walters* v. *United States*, 175 Ct. Cl. 215, 358 F. 2d 957 (1966).

"Since there is a strong presumption that the Correction Board and the Secretary faithfully discharge their duties, plaintiff has the burden of proving otherwise. *Cooper* v. *United States*, 203 Ct. Cl. 300 (1973); *Dorl* v. *United States*, 200 Ct. Cl. 626, *cert denied*, 414 U.S. 1032 (1973). In this case plaintiff has failed to submit cogent and clearly convincing evidence that the decision of the Correction Board was arbitrary or capricious. *Sanford* v. *United States*, 399 F. 2d 693 (9th Cir. 1968). This standard has been followed by this

court in *Unterberg* v. *United States*, 188 Ct. Cl. 994, 412 F. 2d 1341 (1969). The general and conclusionary statements offered by plaintiff do not qualify as 'cogent and clearly convincing evidence.' Nor is there a showing of bias or prejudice which might suggest an error or injustice in the Correction Board proceedings. *Boyd* v. *United States*, 207 Ct. Cl. 1, *cert. denied*, 424 U.S. 911 (1976).

"Plaintiff's allegation that she was denied due process is based upon her contention that, as a matter of law, it was incumbent upon the Air Force to provide plaintiff with copies of all materials to be considered by the S.R. Board, including the legal opinion of the Air Force, so that plaintiff could file a rebuttal.

"Plaintiff fails to cite any authority in support of her contention that she was entitled to have copies of everything that was before the S.R. Board. Moreover, plaintiff has been unable to point to any Air Force Regulation which has not been strictly adhered to by defendant.

"The applicable regulations governing the Selective Reenlistment Program for first-term airman are found in AFM 35–16 Volume 1 (C17). Paragraph 9 of Chapter 11 provides:

> Opportunity to Submit Additional Information. Prior to referral of cases to the SRP board, the unit commander will afford the airman an opportunity to furnish a written statement or other documentation which, in the airman's opinion could have a bearing on his qualifications for selection. Personal appearance before the SRP board is not appropriate.

This regulation was complied with. The plaintiff was given an opportunity to furnish a written statement and other documentation which she thought could have a bearing on her qualifications for selection, and she did, in fact, submit such a statement and other documentation before the meeting of the S.R. Board. There is no regulation that requires that the plaintiff be furnished with copies of documents before the S.R. Board, nor that gives the plaintiff the right of rebuttal.

"The Air Force Selective Reenlistment Program is a managerial program designed to enable the Air Force to select the best qualified first-term enlisted personnel for continued service. It is not a judicial proceeding, and as such, plaintiff

had no 'constitutional right' to submit anything. What rights plaintiff had were those granted by applicable Air Force Regulations. Pursuant to AFM 36–16, airmen are permitted to furnish a written statement or other documentation which they believe have a bearing on their qualifications for reenlistment to the S.R. Board. In this case, plaintiff was afforded, and exercised, every right provided by the applicable regulations. In the present case there was no violation of the procedures set forth in AFM 35–16 for the operation of the S.R. Board.

"Air Force Regulation 39–14, entitled 'Separation for the Convenience of the Government,' paragraph 2 provides:

> *Authority to Order Discharge or Release.* The Secretary of the Air Force may direct the separation of any airman prior to expiration of term of service. * * *

"In *Birt* v. *United States*, 180 Ct. Cl. 910 (1967), this court affirmed the right of the Air Force to separate servicemen prior to expiration of their term of enlistment, stating:

> A serviceman does not have a right per se to remain in service until the expiration of his enlistment. *McAulay* v. *United States*, 158 Ct. Cl. 359, 305 F. 2d 836 (1962), *cert. denied*, 373 U.S. 938 (1963); *Reed* v. *Franke*, 187 F. Supp. 905 (E.D. Va. 1960), *aff'd* 297 F. 2d 17 (4th Cir. 1961). His removal prior to that time may be accomplished administratively, *Rowe* v. *United States*, 167 Ct. Cl. 468, 470–72 (1964), *cert.* denied, 380 U.S. 961 (1965), and such action would be subject to invalidation by the judiciary only if it exceeded statutory authority, *Harmon* v. *Brucker*, 355 U.S. 579 (1958), ignored procedural rights, *Murray* v. *United States*, 154 Ct. Cl. 185 (1961), or violated minimum concepts of fairness, *Clackum* v. *United States*, 148 Ct. Cl. 404, 296 F. 2d 226 (1960). Absent any such irregularity, there is no basis for judicial scrutiny for we may test the validity of a discharge only in terms of its legal sufficiency and not in terms of the military's wisdom in discharging one of its members. [*Id.* at 913.]

"The Air Force has limited its discretionary right to refuse reenlistment. In this case, failure to be selected under the Selective Reenlistment Program was a reason rendering a member ineligible to reenlist (Rule 5, Table 10–1, Change 17, February 1, 1973, to AFM 35–16, December 4, 1968). The

Selective Reenlistment Board procedure was the method provided in the directive for making this determination. If a member was denied reenlistment by this process, as was the applicant, she was not denied any right; rather the Air Force in its discretion decided not to extend a privilege.

"Plaintiff's argument that she was denied administrative due process appears to be based on the premise that she had a *right* to reenlist. Actually, no service member has any statutory right to reenlist. 10 U.S.C. § 508(b), the statute which provides for reenlistment, is clearly permissive:

> A person discharged from a Regular component may be reenlisted in the * * * Regular Air Force * * * under such regulations as the Secretary concerned may prescribe.

It is evident from the language of the statute that Congress intended for the Service Secretaries to exercise total control on the conditions and circumstances under which a military member may be permitted to reenlist. By the promulgation of Air Force Regulations, the Secretary of the Air Force has determined these conditions and circumstances. Absent a showing that these regulations are unreasonable, they will not be ignored by the courts. *United States* v. *Miller*, 303 F. 2d 703, 707 (9th Cir. 1962), *Panama Canal Co.* v. *Grace Line*, 356 U.S. 309, 317–18 (1958). Among the regulations promulgated by the Secretary, is Air Force Manual 35–16 (C17) February 1, 1973, which provides, *inter alia:*

> 10–2. Policies and Instructions:
> a. Secretarial Authority. * * * [T]he Secretary of the Air Force may * * * deny reenlistment to any person if the Secretary determines that such * * * denial is in the best interest of the Air Force.

This manual was in force and effect on the date of plaintiff's discharge. The exercise of the Secretary's discretion in permitting reenlistment was considered by this court in *O'Callahan* v. *United States*, 196 Ct. Cl. 556, 451 F. 2d 1390 (1971). The court, speaking of the claim of the petitioner that he had been denied a 'right' to reenlist, said:

> * * * The issue, most clearly stated, is whether the Secretary of any service arm is required to postulate a re-enlistment without exercise of discretion in individual

> cases. We think that he is not. The principles of efficient management, maintenance of morale, and the continued public trust in our Armed Services require that more substantial discretion be left in the hands of those who manage and maintain the Armed Services. * * * [*Id.* at 561, 451 F. 2d at 1392–93.]

"We are not persuaded by the plaintiff's constitutional argument of lack of due process. As stated above, this was not a judicial proceeding, nor a trial, nor even a contest, but only a managerial system designed to enable the Air Force to select the *best qualified* first-term enlisted personnel for continued service. Even if the plaintiff was qualified, she evidently was not the best qualified of those available for selection for reenlistment, and the Secretary, acting through the S.R. Board, had full authority under the law to determine this fact and to deny her the right to reenlist, and to separate her before the end of her first-term enlistment. It is well-established that not every constitutional-due process question advocated by a party rises to a constitutional level. *United States* v. *Augenblick*, 393 U.S. 348 (1969). The due process issue urged by the plaintiff in this case belongs in that category.

"We conclude that the decision of the Correction Board was neither arbitrary nor capricious and was supported by substantial evidence and was in conformity with all applicable laws and regulations.

"Plaintiff's motion for summary judgment is denied and defendant's cross-motion for summary judgment is allowed and plaintiff's petition is dismissed."

No. 210–75. APRIL 16, 1976

Eldorado Canyon Resort, Inc.

Termination of concession contract; just compensation; fair market value v. book value of possessory interest.—On April 16, 1976 the court entered the following order:

Before SKELTON, *Judge*, Presiding, KASHIWA and BENNETT, *Judges*.

"The Lake Mead National Recreation Area is under the control of the National Park Service, Department of the

Interior. The concession contract between plaintiff and the National Park Service with which the present litigation is concerned was executed on March 15, 1972, and covered the period January 1, 1972, through December 31, 1976. On September 14, 1974, a flash flood occurred in the Eldorado Canyon area, caused by a sudden and severe rainstorm. The flood claimed nine lives and caused tremendous property damage. Shortly after the flood the National Park Service requested the Department of the Interior's Geological Survey to make a hydrologic assessment of the flood and the chance of its recurrence. The results of that assessment are contained in the Geological Survey's Open-File Report No. 75–14, published in December, 1974. This public document is defendant's Exhibit B. We take judicial notice of the document. One of the conclusions reached was the following:

> The intense magnitude of the September 14 flood gives no guarantee that another disastrous flood won't occur in the foreseeable future. Therefore, a reasonable course would be to assume such a flood can and may occur in any given year.

"A decision was made, and announced by the National Park Service on February 25, 1975, to permanently close the Eldorado Canyon area. Plaintiff's president was informed of this decision on that date by Superintendent Briggle. Plaintiff does not dispute the decision to close. We find that the decision was proper under the circumstances. The only matter to be resolved was the amount of compensation to which plaintiff was entitled for its possessory interest. The manner in which this compensation would be calculated was provided in Section 12(a)(2) of plaintiff's concession contract. With respect to the *method* by which 'just compensation' is to be determined, plaintiff has alleged and claims that it is entitled to 'fair market value' and not book value. This claim is directly contrary to the terms of plaintiff's contract. Although plaintiff may now consider this amount insufficient compensation, it nevertheless agreed to the terms of this contract when it was signed, and this court 'must enforce a mutually agreed-upon contract according to its terms.' *Broome Construction, Inc.* v. *United States*, 203 Ct. Cl. 521, 530, 492

F. 2d 829, 834 (1974). See *Aragona Construction Co.* v. *United States*, 165 Ct. Cl. 382, 390 (1964).

"Moreover, the exact words of Section 12(a) of plaintiff's contract, which limit it to book value compensation, have been considered and ruled upon by this court. In *Schoeffel* v. *United States*, 193 Ct. Cl. 923 (1971), the court reviewed a concession contract let by the National Park Service which contained the same Section 12(a) (2) and (3) as is contained in the present contract. 193 Ct. Cl. at 930. Relying on those provisions and its prior holding in *Bishop* v. *United States*, 164 Ct. Cl. 717 (1964), the court held that there was no taking and that just compensation to the plaintiffs was the book value of plaintiffs' improvements, as provided in its contract. 193 Ct. Cl. at 936. There can be no doubt that plaintiff's total and exclusive recovery is the book value of its possessory interest as of the date of the contract's termination, April 25, 1975. We hold that none of the legal theories advanced by plaintiff in its petition or its pretrial submission could, as a matter of law, entitle it to any compensation greater than the net book value allowed by its contract. Plaintiff is entitled to recover book value, $6,281 subject to offset by defendant's counterclaims for $110.51, for a net allowable recovery of $6,170.49. For the foregoing reasons,

"IT IS ORDERED that defendant's motion for summary judgment is granted in that plaintiff is entitled to recover book value, $6,281 subject to offset by defendant's counterclaims for $110.51, for a net allowable recovery of $6,170.49. Judgment is hereby entered in favor of plaintiff and against defendant in the sum of $6,170.49. Plaintiff's petition for any sum in excess of said $6,170.49 is hereby dismissed."

No. 390–75. APRIL 16, 1976

Clyde A. Ray

Military pay; additional active duty pay and disability pay; res judicata; limitation of actions; laches.—On April 16, 1976 the court entered the following order:

Before SKELTON, *Judge*, Presiding, KASHIWA and BENNETT, *Judges*.

"Plaintiff in this pro se case is a retired colonel in the United States Air Force. He has been before the court previously, *Ray* v. *United States*, 197 Ct. Cl. 1, 453 F. 2d 754 (1972), seeking correction of his military records showing entitlement to active duty pay, disability and other benefits, and a refund of federal income tax withheld from his retired pay for the years 1960 through 1968. Plaintiff recovered $5,577.35 in the earlier case, based on the pleadings and facts shown below.

"In the prior case, No. 442–65, this same plaintiff, in a pro se petition filed on December 27, 1965, claimed retirement for physical disability and sought to recover active duty pay and allowances from January 31, 1960, until March 30, 1960, and disability retirement pay from March 30, 1960. On March 22, 1966, plaintiff, who was then represented by an attorney, filed an amended petition wherein plaintiff alleged that although he had been retired from the Air Force for length of service effective January 31, 1960, after 22 years of active military service, he was entitled to, in lieu thereof, a physical disability retirement ratable at not less than 75 percent. Plaintiff thereupon sought to recover disability retirement pay in an amount equal to 75 percent of the pay of a colonel, less the amount of longevity retired pay actually received by the plaintiff, plus an amount equal to the tax plaintiff had been required to pay on his longevity retirement pay.

"In a letter to the Executive Secretary of the Air Force Board for the Correction of Military Records, dated October 1, 1969, plaintiff's attorney in Court of Claims No. 442–65, Thomas H. King, Esquire, requested that the Correction Board, which had earlier denied plaintiff's application on October 1, 1963, again consider plaintiff's application to the Board. The letter stated therein, in pertinent part, as follows:

> * * * It has been agreed between the attorney for the Department of Justice [Charles M. Munnecke] and the undersigned, as counsel for Colonel Ray, that Colonel Ray was at the time of his separation unfit for active service in the United States Air Force with a disability rating of 50 percent; that Colonel Ray had a hearing problem; that he had a hiatal hernia; that he had

> scoliosis; that he had esophogitis, and that he had hypothyroidism. It has been further agreed that, due to the fact that Colonel Ray continued to receive hospital treatment at Lackland Air Force Base through March 30, 1960, his date of separation should be corrected to reflect that date as the date of his separation. These agreements have been on an informal basis and not reduced to writing. * * *

This October 1, 1969, letter from plaintiff's attorney to the Correction Board contained the following endorsement thereon:

> I, Clyde A. Ray, Colonel, USAF, Ret., the applicant in the above-captioned case, have read the foregoing letter prepared by my attorney and *I agree to accept the settlement insofar as disability and date of separation are concerned* with the understanding that the Finance Center will properly compute the amounts due me. [Emphasis supplied.]
>
> /s/ Clyde A. Ray

"Proceedings in this court in No. 442–65 were thereupon suspended to permit the Air Force Board for the Correction of Military Records to correct plaintiff's records to reflect his retirement for physical disability ratable at 50 percent. The Correction Board proceedings dated October 30, 1969 disclose that the Board recommended that plaintiff's records be corrected to show that plaintiff was not retired by reason of years of service on January 31, 1960, but that plaintiff continued *on activity duty* until March 30, 1960, when plaintiff's name was placed on the Permanent Disability Retired List by reason of a total combined compensable rating of 50 percent with entitlement to disability retired pay effective March 31, 1960. The recommendation of the Correction Board was approved by the Assistant Secretary of the Air Force on November 7, 1969.

"Pursuant to the Board's action, as approved by the Assistant Secretary, the Air Force Accounting and Finance Center recomputed plaintiff's pay and *paid the difference between active duty pay and retirement pay* for the period January 31 to March 31, 1960. Also refunded were certain deductions taken which were not applicable to disability retirement pay. However, the Finance Center did not refund income taxes withheld from plaintiff's pay during 1960 to

1968, inclusive. Pursuant to claims filed with the Internal Revenue Service for refund of taxes paid, plaintiff received favorable action for the years 1966–1968.

"This court in its decision of January 21, 1972, 197 Ct. Cl. 1, 453 F. 2d 754, entered a judgment for the plaintiff with respect to the withheld taxes for the years 1960 through 1965, and on April 17, 1972, judgment was entered for plaintiff in the amount of $5,577.35 (197 Ct. Cl. at 10).

"Plaintiff's instant petition, filed in this court on November 5, 1975, Ct. Cl. No. 390–75, seeks to recover a judgment for *active duty pay* and allowances from (as best as can be determined from plaintiff's petition) the time he was released from active duty and retired from the Air Force on March 30, 1960, until the date of the court's decision, and disability pay thereafter.

"Plaintiff's petition in his earlier case, No. 442–65, filed December 27, 1965, asked the court, in the prayer for relief, to enter a judgment in pertinent part as follows:

> 3. That the Plaintiff was retired for disability on March 30, 1960 or such later disability retirement date as determined by the honorable court;
>
> 4. That the Plaintiff is entitled to *active duty pay* and allowances until March 30, 1960 or until such later disability retirement date as determined by the honorable court;
>
> 5. That the Plaintiff is entitled to *disability retirement pay* from March 30, 1960 or from such later disability retirement date as determined by the honorable court.
>
> [Emphasis supplied.]

"In plaintiff's amended petition filed March 22, 1966, in No. 442–65, plaintiff alleged therein that he was retired from active duty as a colonel, not by reason of physical disability, effective January 31, 1960, and that in lieu thereof, he was entitled to disability retired pay based upon disabilities ratable at not less than 75 percent. Plaintiff sought to recover a judgment in an amount equal to 75 percent of the pay of a Colonel, less the retired pay received by the plaintiff, plus an amount equal to the tax plaintiff had been required to pay on his longevity retirement.

"Plaintiff's amendment to the amended petition, filed November 20, 1970, in No. 442–65 alleged therein that pur-

suant to the action of the Air Force Board for the Correction of Military Records, the Secretary of the Air Force corrected plaintiff's records to show that his date of retirement from the service was March 30, 1960 in lieu of January 31, 1960, and to also show that he was entitled to disability retired pay effective March 31, 1960. Plaintiff thereupon sought to recover the federal income taxes which the Air Force Finance Center withheld from plaintiff's disability retirement pay which should have been paid to plaintiff by the Finance Center based upon the correction of plaintiff's records. This court, in its January 21, 1972 decision, 197 Ct. Cl. 1, 453 F. 2d 754, awarded plaintiff the aforesaid withheld taxes and a judgment was entered for plaintiff in the amount of $5,577.35.

"It is clear that the issues raised in plaintiff's instant petition form part of the same claim as was adjudicated in plaintiff's earlier 1965 suit. Accordingly, plaintiff's instant suit, seeking *any additional active duty pay* and allowances, and/*or disability pay* from 1960, is barred on the ground of res judicata. All relief sought by plaintiff relating to matters litigated or which could have been litigated in his earlier suit is barred by the doctrine of res judicata.

"As this court stated in *Container Transport International* v. *United States*, 199 Ct. Cl. 713, 468 F. 2d 926 (1972):

> The general rule is, of course, that a final decision on the "merits" of a claim bars a subsequent action on that same claim or any part thereof, including issues which were not but could have been raised as part of the claim. *See Lawlor* v. *National Screen Service*, 349 U.S. 322, 326–27 (1955); *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948); *Creek Nation* v. *United States*, 168 Ct. Cl. 483, 488 (1964). A plaintiff who splits his claim (or cause of action) and fails to include his entire demand in his first suit will have, as a result, to give up the part on which he fails to sue the first time. *See Baird* v. *United States*, 96 U.S. 430, 432 (1877); *Nager Electric Co.* v. *United States*, 177 Ct. Cl. 234, 246, 368 F. 2d 847, 855–56 (1966). [*Id.* at 717, 468 F. 2d at 928.]

See also Clark v. *United States*, 150 Ct. Cl. 470, 281 F. 2d 443 (1960).

"Any attempt to relitigate any matters occurring prior to six years after plaintiff was retired on March 30, 1960, is, of course, barred by the statute of limitations, 28 U.S.C. § 2501.

In fact, post-discharge remedies, such as afforded by the Air Force Board for Correction of Military Records which took its action in this case in 1969, are permissive in nature and do not serve to toll the running of the statute of limitations. *Mathis* v. *United States*, 183 Ct. Cl. 145, 391 F. 2d 938 (1968), *aff'd on rehearing*, 190 Ct. Cl. 925, 421 F. 2d 703 (1970); *Kirk* v. *United States*, 164 Ct. Cl. 738, 742–43 (1964); *Lipp* v. *United States*, 157 Ct. Cl. 197, 199, 301 F. 2d 674, 675 (1962), *cert. denied*, 373 U.S. 932 (1963).

"Plaintiff's claim is also barred by the doctrine of laches. There has been a lapse of 15 years since plaintiff's release from active duty and his retirement, 12 years since his first application to the Board of Correction of Military Records, and almost six years since the Assistant Secretary of the Air Force took his action ordering the correction of the plaintiff's records based upon the recommendation of the Correction Board on November 2, 1969. Plaintiff, in his petition filed in this court on November 5, 1975, is in effect asking this court to repudiate the action of the Correction Board as approved by the Assistant Secretary of the Air Force. Plaintiff is barred from repudiating such action by 10 U.S.C. § 1552(c) (1970), which provides in part:

> (c) * * * A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. * * *

Prejudice to the Government is manifest when a judgment favorable to the plaintiff here could result in the payment of two salaries when the Air Force has received the services of only one member. *Brundage* v. *United States*, 205 Ct. Cl. 502, 504 F. 2d 1382 (1974), *cert. denied*, 421 U.S. 998 (1975).

"Finally, plaintiff is estopped from seeking to recover 'active duty pay and allowances until the date of decision in this action.' Plaintiff did not ask the Correction Board to correct his records to show that he was due active duty pay after March 30, 1960. Having failed to request that relief from the Board, plaintiff should not be allowed to claim it here. *Keef* v. *United States*, 185 Ct. Cl. 454, 469 (1968); *Abruzzo* v. *United States*, 206 Ct. Cl. 731, 739, 513 F. 2d 608, 612 (1975). Also, plaintiff is estopped to claim further active duty pay and allowances and increased disability pay by his action in submitting through his attorney a proposition of settlement to

the Board whereby he agreed to accept active duty pay and allowances from January 31, 1960, to March 30, 1960, and agreed to retirement on 50 percent disability on March 31, 1960, and, thereafter, which proposal was accepted and finalized by the Board, and in accordance therewith plaintiff received the $5,577.35 resulting therefrom.

"Furthermore, if plaintiff was in fact 50 percent disabled in 1960, as the Correction Board found and as he agreed, or 75 percent disabled, as he alleged, plaintiff could hardly be medically fit for continued active duty from 1960 to the present time, for which period he now seeks active duty pay before this court.

"Therefore, IT IS ORDERED that defendant's motion for summary judgment be granted, and that plaintiff's petition be dismissed."

No. 307–75. APRIL 16, 1976

Zisken Construction Company

Contracts; unsuccessful bidder; bid preparation costs and anticipated or lost profits.—On April 16, 1976 the court entered the following order:

Before SKELTON, *Judge*, Presiding, KASHIWA and BENNETT, *Judges.*

"This contract case comes before us upon defendant's unopposed motion for summary judgment, filed January 22, 1976. The petition alleges that Navy contract N62472–C–0136, for the construction of certain Bachelor Enlisted Quarters at the Naval Training Center, Great Lakes, Michigan, was illegally awarded to Jenkins and Boller Company, Inc., one of plaintiff's competitors. Plaintiff claims entitlement to its lost anticipated profit and bid preparation expenses.

"The invitation for bids called for quotes on two separate items. In Item 1 the bidder was to state the price for the entire cost of construction, including certain less expensive bathroom facilities and accessories. In Item 2 the bidder was to state the amount by which the price in Item 1 would be *increased* if certain more expensive bathroom facilities and accessories were substituted, and additional electrical out-

lets installed. Nine bidders responded to the invitation, and it appeared upon opening that plaintiff was lowest. However, five of the nine had quoted in Item 2 a price which exceeded the figure for Item 1. Thus, it appeared as though these five had erroneously placed in Item 2 not the *increment* to the figure called for by Item 1, but rather a figure representing the entire cost of construction including the more expensive materials and facilities.

"The contracting officer responded by contacting Jenkins, among the others, and inquiring as to the true intended bid. Jenkins replied that the bid in Item 2 should have been $80,000—being only the increase in price which would be required for more expensive bathroom facilities and additional electrical outlets—and not the $3,819,240 originally bid on Item 2. Thus, plaintiff was replaced as low bidder and lost the contract.

"By now it is settled beyond doubt that a disappointed bidder may not generally recover anticipated profits. *Excavation Constr., Inc.* v. *United States*, 204 Ct. Cl. 299, 301, 494 F. 2d 1289, 1290 (1974); *Keco Indus., Inc.* v. *United States*, 192 Ct. Cl. 773, 784, 428 F. 2d 1233, 1240 (1970). However, bid preparation expenses may be recovered by the disappointed bidder if the bid is not evaluated fairly and honestly, *Heyer Products Co.* v. *United States*, 135 Ct. Cl. 63, 140 F. Supp. 409 (1956), or if the contracting officer otherwise acts arbitrarily or capriciously in evaluating the bids submitted in response to the invitation. *Keco Indus., Inc.* v. *United States*, *supra*, 192 Ct. Cl. at 782, 428 F. 2d at 1238. However, a contracting officer does not act arbitrarily or capriciously by alerting bidders to the presence of mere clerical errors in their bids, and in seeking revised bids upon disclosure of such mistakes. ASPR § 2–406.2, 32 C.F.R. § 2.406–2 (1973). In this case no allegation is made that plaintiff's bid was not honestly evaluated. Moreover, no reasonable mind could accept the idea that the additional cost for improved bathroom facilities and additional electrical outlets would exceed the entire cost of the construction project itself without such improvements. A glance at the bids shows the presence of mere clerical errors, correction of which the contracting officer was at liberty to seek

in the manner authorized by the ASPR. We find as a matter of law that the contracting officer did not act arbitrarily or capriciously in awarding the contract to Jenkins instead of to this plaintiff.

"IT IS THEREFORE ORDERED, upon consideration of defendant's motion for summary judgment without response thereto and without oral argument, that the said motion should be and the same hereby is allowed. The petition is dismissed."

No. 328–75. APRIL 16, 1976

John C. Woodward

Military pay; Court of Claims jurisdiction; correction of military records; change from longevity retirement to retirement for physical disability.—On April 16, 1976 the court entered the following order:

Before COWEN, *Chief Judge*, NICHOLS and KUNZIG, *Judges*.

"This case comes before the court on defendant's motion to dismiss, filed November 10, 1975. Plaintiff, a Lieutenant Colonel in the Air Force, retired for length of service (longevity) with the maximum 75 percent retirement pay, effective December 1, 1973. On December 10, 1974, plaintiff's application for correction of his records to reflect retirement for physical disability rather than longevity was denied without hearing by the Air Force Board for the Correction of Military Records. Although the maximum pay which plaintiff could receive pursuant to 10 U.S.C. §§ 1201 and 1401 (1970) is admittedly the same whether plaintiff's retirement were deemed for disability or longevity, disability retirement pay constitutes tax-exempt income under § 104(a)(4) of the Internal Revenue Code of 1954. Plaintiff has not filed claims for tax refunds with the Internal Revenue Service. On September 9, 1975, plaintiff filed a petition in this court, seeking both correction of his military records to show retirement for disability, and a money judgment for amounts alleged to have been improperly withheld by the Air Force from his retirement pay for income tax purposes. Upon consideration of defendant's motion, together with plaintiff's opposition and defendant's reply, without oral argument, it is concluded that this case is factually indistinguishable from and

squarely controlled by the decision of the Supreme Court in *United States* v. *King*, 395 U.S. 1 (1969). As the Court therein stated:

> [N]either the Act creating the Court of Claims nor any amendment to it grants that court jurisdiction of this present case. That is true because Colonel King's claim is not limited to actual, presently due money damages from the United States. Before he is entitled to such a judgment he must establish in some court that his retirement by the Secretary of the Army for longevity was legally wrong and that he is entitled to a declaration of his right to have his military records changed to show that he was retired for disability. This is essentially equitable relief of a kind that the Court of Claims has held throughout its history * * * that it does not have the power to grant.

395 U.S. at 3. *See also United States* v. *Testan*, 44 U.S.L.W. 4245, 4247 (March 2, 1976). Under the mandate of *King*, as recently reaffirmed by *Testan*, there is no alternative but to conclude that plaintiff has not stated a claim for which relief can be granted within the jurisdiction of this court. *Ray* v. *United States*, 197 Ct. Cl. 1, 453 F. 2d 754 (1972) is not applicable because in that case, the Board for the Correction of Military Records changed the plaintiff's retirement status, thereby entitling him to recover.

"IT IS THEREFORE ORDERED that defendant's motion to dismiss is granted, and that plaintiff's petition be and the same is hereby dismissed."

Plaintiff's motion for reconsideration by the court *en banc* was denied June 25, 1976. *Judge* Nichols would grant plaintiff's suggestion and motion for reconsideration by the court *en banc*.

No. 336–75. APRIL 16, 1976

Yankee Metal Products, Inc.

Court of Claims jurisdiction; Federal Water Pollution Control Act; oil spill liability; recovery of removal costs.— On April 16, 1976 the court entered the following order:

Before SKELTON, *Judge*, Presiding, KASHIWA and BENNETT, *Judges*.

"Plaintiff, Yankee Metal Products, Inc., alleges that on or about August 24, 1974, a policeman of the Town of Norwalk, Connecticut, and an official of the State of Connecticut Environmental Protection Agency 'pressured, cajoled and forced' the plaintiff to assist the New England Pollution Control Company, Inc., in cleaning oil from the Norwalk River at a point below a facility operated by the plaintiff off the river. The New England Pollution Company has demanded that the plaintiff pay it $15,150.03 for its work and has sued the plaintiff in a state court of Connecticut for that amount. The plaintiff has sued the United States in this case, asking for a judgment of $16,000, interest and costs, and for an order directing the Government to hold and protect the plaintiff harmless from any costs and liability for the removal of the oil from the river. The Government has moved to dismiss the case on the ground that plaintiff's petition does not state a claim upon which relief may be granted.

Plaintiff bases its claim upon the Federal Water Pollution Act, 33 U.S.C. § 1321(i)(1) (Supp. II, 1972), 86 Stat. 862, *as amended*, 87 Stat. 906. This statute provides in pertinent part as follows:

> (i) Recovery of removal costs.
>
> (1) In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil or a hazardous substance is discharged in violation of subsection (b)(2) of this section acts to remove such oil or substance in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Court of Claims, that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing causes.

It is clear from this statute that the elements of a claim for relief under its provisions consist of the following:

(1) A discharge of a harmful quantity of oil from a facility owned or operated by plaintiff;

(2) A discharge caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party;

(3) Removal of the oil in accordance with regulations; and

(4) Expenditure by plaintiff of monies to remove the oil.

The plaintiff has not met the requirements of the statute. In its amended petition plaintiff says:

> Plaintiff was not responsible for the presence of the oil in the Norwalk River, and the source of the same remains unknown, but upon information and belief, such oil was upon Plaintiff's facility before entering said River. The Plaintiff believes the discharge was caused solely by either (a) an act of God, or (b) an act or omission of an unknown third party or parties, or by a combination of the foregoing causes.

It will be noted that these statements do not allege that the oil was discharged from a facility owned or operated by the plaintiff. Without such an allegation, the plaintiff cannot recover. The statement that "the source of the oil is unknown and that upon information and belief such oil was upon plaintiff's facility before entering said River," does not meet the requirements of the statute. Under the Act, 33 U.S.C. § 1321(a)(2), the term "discharge"—

> includes, but is not limited to any spilling, leaking, pumping, pouring, emitting, emptying or dumping;

The term "discharge" refers to the source or party that releases the oil. The plaintiff denies that it released the oil and says that its source is unknown. These allegations do not meet the requirements of the statute.

Furthermore, the allegations that plaintiff believes the discharge was caused by either (A) an act of God, or (B) an act or omission of an unknown third party or parties, or by a combination thereof, without any allegation of facts to support such statements, are merely conclusions of the plaintiff that fall far short of complying with the requirements of the statute.

Also, plaintiff alleges that it has "incurred expenses and paid for men and material in said cleaning" but it does not allege how much this amounts to. No court could enter a

judgment on this kind of an allegation even if all of the other requirements of the Act were met. The plaintiff admits that it has not paid the New England Pollution Control Company, Inc., the $15,150.03 and indicates it is contesting the suit of that company for such amount in a state court. Therefore, plaintiff has not alleged any damage claim upon which this court can act.

The plaintiff has asked this court to enter an "order directing the defendant to hold and protect the plaintiff harmless from any costs and liability for the removal of the oil from the River." Such an order would be a declaratory judgment as to the rights of the plaintiff and the exercise of equitable powers by the court. This court cannot issue a declaratory judgment. It can only grant a judgment for money presently due, and can only exercise equitable powers in aid of such a money judgment. *See United States* v. *King*, 395 U.S. 1 (1969). Consequently, the court is without power to grant the relief requested by the plaintiff.

"We conclude that the plaintiff has not alleged a claim upon which relief can be granted. Defendant's motion to dismiss is granted and plaintiff's petition, as amended, is dismissed."

No. 412–75. APRIL 16, 1976

Central Gulf Lines, Inc.

Court of Claims jurisdiction; admiralty claim; contract for carriage of goods by sea.—On April 16, 1976 the court entered the following order:

Before SKELTON, *Judge*, Presiding, KASHIWA and BENNETT, *Judges*.

"This case comes before us on defendant's motion to dismiss or transfer, filed February 4, 1976. Plaintiff seeks judgment for the carriage of goods by sea for defendant. The petition alleges that at all relevant times plaintiff was the owner of certain 'LASH' barges designed to transport various cargo, as well as owner of the *Green Harbour*, a larger 'Mother LASH' vessel capable of hoisting aboard the smaller barges for transport over longer distances. Plaintiff's barges were situated near Saigon just before South Vietnam fell into communist

hands in 1975. It was becoming evident to American officials with the United States Agency for International Development (USAID) that arrangements would have to be made on an expedited basis to remove the household effects and other personal property of Americans stationed in Vietnam. Government officials made contact with plaintiff through its Vietnamese agent for the purpose of obtaining a quote on the movement of this property by barge. Plaintiff agreed to provide 16 barges at a lump sum transportation rate per barge of $47,287.

"The petition alleges, further, that in-port loading of plaintiff's barges progressed much too slowly, while conditions in Vietnam deteriorated much too quickly. As originally contemplated, the barges would have been towed to sea by yet another unit of plaintiff's fleet, a 'Feeder LASH' or 'FLASH' vessel. At another point the barges would have been hoisted aboard the *Green Harbour* for the journey to the United States. In view of the imminent collapse of Saigon, however, it became necessary to consult further with plaintiff and to arrange for defendant's vessels to tow plaintiff's barges to sea for rendezvous with the *Green Harbour*. The Mother LASH vessel had to be diverted for refueling and then dispatched to a point just off the coast of Vietnam for rendezvous with the 16 barges. This change of plans was carried out and the cargo sent on its way to Norfolk, Virginia.

"Just before the *Green Harbour's* arrival in Norfolk, officials of USAID assured plaintiff that it would be paid 'any sum determined to be due and owing from A.I.D.' On arrival all cargo allegedly was offloaded in an orderly manner. To date plaintiff admits that it has been paid $260,006.73, leaving an alleged balance due and owing of $553,150.76.

"Defendant has filed a motion to dismiss, or transfer, contending that exclusive jurisdiction of the subject matter is vested in the United States District Court for the Eastern District of Louisiana, under the Suits in Admiralty Act, 41 Stat. 525 (1920), as amended, 46 U.S.C. §§ 741–52 (1970). Defendant asserts that a purely maritime contract existed between the parties hereto which, since cognizable in admiralty, must be adjudicated in the District Court. Plaintiff's opposition shows that it would characterize its rights against de-

fendant as proceeding not from a maritime contract, but more broadly from either a taking without just compensation under the Fifth Amendment of the Constitution or, alternatively, from an express or implied contract with the United States within the meaning of the Tucker Act, 28 U.S.C. § 1491 (1970). Plaintiff denies admiralty jurisdiction. For purposes of this motion we must decide whether a purely maritime contract existed as between these parties.

"Sections 1 and 2 of the Suits in Admiralty Act, 46 U.S.C. §§ 741–42 (1970), when read together, provide that in the case of a plaintiff who has a claim against the United States which is cognizable in admiralty and which would be enforceable by arrest or seizure of a vessel were the United States not involved, the exclusive remedy shall be available in a nonjury, *in personam* proceeding in the United States District Court for the district in which the plaintiff's principal place of business is situated. We have recognized that where such admiralty jurisdiction exists we have no jurisdiction and must transfer the case to its proper forum under 28 U.S.C. § 1506 (1970). *Northwest Marine Iron Works* v. *United States*, 203 Ct. Cl. 629, 493 F. 2d 652 (1974); *Alaska Barge & Transport, Inc.* v. *United States*, 179 Ct. Cl. 216, 220, 373 F. 2d 967, 970 (1967).

"An ordinary contract for the carriage of goods by sea is a purely maritime contract. *Krauss Bros.* v. *Dimon S.S. Corp.*, 290 U.S. 117 (1933); *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 47 U.S. (6 How. 344) 722 (1848). Without entering a true contractual relationship, however, the United States may seize or requisition private vessels for its use. When it does so the claim may not be based on a purely maritime contract, but rather upon a Fifth Amendment taking for which suit apparently would be maintainable in this court. *See American Mail Line, Ltd.* v. *United States*, 101 Ct. Cl. 377 (1944). That case did not discuss the Suits in Admiralty Act, however. In a third type of controversy, even where the vessel in question has been initially seized or requisitioned by the United States the Fifth Amendment claim may be superseded if, after the seizure, the owner enters into a maritime contract with the United States. In one case, for

example, at the time such a contract was executed the owner's rights became purely contractual in nature. *Matson Nav. Co.* v. *United States*, 284 U.S. 352 (1932).

"Based upon the allegations in the petition and an admission appearing in defendant's reply brief filed February 27, 1976, the court finds that a purely maritime contract exists as between the parties in this case. The petition does not allege that the Government unilaterally requisitioned or seized plaintiff's property—the relationship was contractual, although not ironed out in every particular in advance of actual sailing. It will be for the District Court to determine what the terms of this contract in fact were. In *Alaska Barge & Transport, Inc.* v. *United States*, *supra*, the full court said that '[f]or jurisdictional purposes, admiralty law has long viewed the nature and subject matter of a contract as controlling.' 179 Ct. Cl. at 220, 373 F. 2d at 970. This case involves a contract for the carriage of goods by sea, which according to the general rule is purely maritime in character.

"IT IS THEREFORE ORDERED, upon consideration of defendant's motion to dismiss or transfer and the opposition thereto, without oral argument, that the motion be and it is granted and the case is hereby transferred to the United States District Court for the Eastern District of Louisiana pursuant to 28 U.S.C. § 1506 (1970). The clerk will transmit to that court a certified copy of the record herein. Further proceedings in the United States Court of Claims are hereby terminated."

No. 448–75. APRIL 16, 1976

Robert E. Burket

Pleading and practice; intervention of Attorney General.—On April 16, 1976 the court entered the following order:

Before COWEN, *Chief Judge*, NICHOLS and KUNZIG, *Judges*.

"This case comes before the court on plaintiff's request for review of the trial judge's order denying plaintiff's motion to require the Attorney General to intervene in this action pursuant to 42 U.S.C. § 2000a–3. Upon consideration of plaintiff's

request, IT IS HEREBY ORDERED that the same is denied and the trial judge's action is affirmed on the following grounds:

"(1) By the express provision of 42 U.S.C. § 2000a–6, the statutory provision regarding the intervention of the Attorney General applies only to suits filed in the district courts of the United States; and

"plaintiff's motion does not meet the requirements of Rule 53(c) of the Court of Claims."

No. 102–63. APRIL 23, 1976

Jessie Short, et al.

Indian claims; third-parties intervention; class action; limitation of actions.—On April 23, 1976 the court entered the following order:

Before COWEN, *Chief Judge*, MARKEY, *Chief Judge* of the United States Court of Customs and Patent Appeals sitting by designation, DAVIS, SKELTON, NICHOLS, KUNZIG and BENNETT, *Judges*, *en banc*.

"This case comes before the court on several requests for review of the order issued July 14, 1975, by the trial judge wherein he: (1) granted the motions to intervene which were filed January 31, 1975, February 20, 1975, and April 7, 1975; and (2) ordered that notice to the absent members of the class of plaintiffs be given in accordance with his accompanying opinion. Upon consideration of the trial judge's order and opinion, the several requests for review, the responses thereto, and the rights and equities of all the parties,

"IT IS ORDERED as follows:

"(1) The trial judge's order allowing the motions to intervene of the 515 applicants named in the motions filed January 31, 1975, February 20, 1975, and April 7, 1975, is affirmed. The 515 applicants are held to be members of the class of plaintiffs, entitled to intervene as a matter of right, and their intervention dates back to the time the suit was instituted so that they, equally with all successful plaintiffs, will have rights to income dating back to 1957;

"(2) The trial judge's holding that the 6-year statute of limitations is applicable to the action brought by the original plaintiffs, as well as by all plaintiffs in the class who have

since been permitted to intervene, is hereby affirmed. *See Capoeman* v. *United States*, 194 Ct. Cl. 664, 762–77, 400 F. 2d 1002, 1005–08 (1971); and

"(3) To the extent that this action has been treated as a class action,

"IT IS ORDERED that the class is hereby closed; that no notice shall issue to any alleged absent member of the class of plaintiffs and that no further interventions in this action shall be permitted. The trial judge's ruling contrary to this paragraph (3) of this order is hereby set aside."

"*Judges* SKELTON and BENNETT concur in all of the foregoing order except that they would hold that the 515 applicants should be permitted to intervene only as a matter of discretion; that their claim would not date back, and that their rights to income would extend only to the 6-year period preceding the date of their actual intervention."

On June 25, 1976 the court denied plaintiffs' motion for rehearing to alter and amend the foregoing order. "*Judges* DAVIS and NICHOLS would modify the court's order of April 23, 1976, to give other potential plaintiffs thirty days from this date in which to intervene (without providing any further notice to such potential intervenors) and would then close the class. They would also change the order to leave entirely undecided the issue of the period which is open for recovery under the statute of limitations."

No. 434–72. APRIL 23, 1976

Alan Donald McCormack

Civilian pay; resignation; voluntariness; duress.—On April 23, 1976 the court entered the following order:

Before SKELTON, *Judge*, Presiding, KASHIWA and BENNETT, *Judges*.

"The test for determining whether a resignation has been tendered voluntarily was succinctly set forth in *Leone* v. *United States*, 204 Ct. Cl. 334, 339 (1974), as follows:

> The case law reveals that the element of voluntariness is vitiated only when resignation is submitted under du-

> ress brought on by government action. The tripart test for such duress is:
>
> * * * (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. * * * *Fruhauf Southwest Garment Co.* v. *United States*, 126 Ct. Cl. 51, 62, 111 F. Supp. 945, 951 (1953).

Accord, *Christie* v. *United States*, 207 Ct. Cl. 333, 337–38, 518 F. 2d 584, 587 (1975). The test is an objective one and, therefore, duress is not measured by an employee's subjective evaluation of the situation. Moreover, a resignation is presumed to be voluntary and said presumption will prevail unless plaintiff comes forward with sufficient evidence to establish that the resignation was involuntarily extracted. *Christie* v. *United States*, *supra*, 207 Ct. Cl. at 338, 518 F. 2d at 587. Further, plaintiff's burden of establishing that his resignation was involuntarily extracted is a heavy one. *Leone* v. *United States*, *supra*.

"Plaintiff has had a full hearing before the Civil Service Commission (CSC) on the merits of his contention that his resignation was involuntary. The standard by which the court will review the CSC's decision is set forth in *Morelli* v. *United States*, 177 Ct. Cl. 848, 858 (1966), as follows:

> * * * Where an administrative agency has complied with the prescribed procedural requirements, the Court of Claims can only review the action to determine whether the officials who effected the dismissal acted arbitrarily, capriciously or were so grossly erroneous as to be in bad faith, as for instance where they may have acted without substantial evidence to support their decision or where they exceeded their authority. * * *

Accord, *Ricci* v. *United States*, 205 Ct. Cl. 687, 693, 507 F. 2d 1390, 1393 (1974); *Grover* v. *United States*, 200 Ct. Cl. 337, 343 (1973).

"In *Holman* v. *United States*, 181 Ct. Cl. 1, 8, 383 F. 2d 411, 415 (1967), we explicitly pointed out that:

> * * * "[i]t is not our function to substitute our judgment for that of the employing agency or the Civil Service Commission. Our review is limited to the sole question of whether their action was reasonable in the light of all the evidence." *Guiness* v. *United States*, 149 Ct. Cl. 1, 6,

cert. denied 363 U.S. 819 (1960). The question is: does the record contain substantial evidence to support the administrative decision? * * * If it does the petition must be dismissed. * * *

"We find and conclude that a review of the administrative record in this case establishes that the CSC's decision that plaintiff's resignation was not other than voluntary was neither arbitrary nor capricious, but, rather, was based upon substantial evidence. We find that the record establishes that the plaintiff's hearing before the CSC contained no prejudicial error. Accordingly, the CSC's decision should be sustained.

"IT IS ORDERED that defendant's motion for summary judgment is granted, plaintiff's motion for summary judgment is denied, and the petition is dismissed."

No. 297–73. APRIL 23, 1976

James M. Williams, Jr.

Civilian pay; dismissal; opportunity to answer personally; allegations of procedural violations.—On April 23, 1976 the court entered the following order:

Before DAVIS, NICHOLS and BENNETT, *Judges.*

"This case comes before the court on plaintiff's motion and defendant's cross-motion for summary judgment. Oral argument has been had and the briefs have been considered. Plaintiff, a veteran and a career Civil Service employee, was removed from his position of Research Agricultural Engineer with the Department of Agriculture at Clemson, South Carolina. The thrust of his separation was that he failed to prepare sufficient publications and that he failed to follow instructions with respect to his work. In the present case he challenges his removal on several grounds, none of which we can sustain as voiding the separation.

"1. Plaintiff claims that he was deprived of his right of oral reply because the notice of charges (which came from headquarters in Maryland) after telling him that he had a right to answer the charges orally or in writing, or in both forms, added: 'If you have any questions regarding this letter or if you wish to answer these charges orally, you should

call Mr. Gerald E. Courtright of this office [headquarters in Maryland] on Area Code 301–474–6500, extension 678.' Plaintiff understood this to mean that if he desired to make an oral reply it would have to be made to Mr. Courtright by telephone—and not wishing this method of oral reply he forwent an oral reply entirely. The agency intended, instead, that if an oral reply was wanted Mr. Courtright would make the arrangements. This portion of the letter of charges was no doubt ambiguous but plaintiff should at least have called Mr. Courtright to find out what the letter meant and how he could make an oral reply. If he had done that, he would have discovered that the agency had no expectation of receiving the oral reply on the telephone (over plaintiff's objection). Plaintiff should not have decided for himself what the letter meant without making inquiry, especially since the letter expressly invited him to make inquiry.*

"2. Plaintiff argues that the notice of charges was not sufficiently specific, but the letter, though inartfully drawn, was very detailed, and plaintiff appears to have thoroughly understood its purport, responding to each charge in detail. This objection is purely a technical one, without foundation in the realities of plaintiff's case.

"3. Another point is that the agency introduced at the Commission hearing new evidence (supporting the charges) which had not been made available to plaintiff when the charges were preferred. This was not contrary to any regulation controlling this particular case, and in any event the new evidence was in rebuttal of arguments presented by plaintiff after the notice of charges rather than in primary support of the charges themselves.

"4. Still another contention made by plaintiff is that the Civil Service Commission erred because it failed to have its hearing taken down verbatim but allowed the evidence to be summarized by the hearing officer. At that time the regulations permitted this practice, and plaintiff was given full opportunity to suggest revisions in the summary (which

*Nor was the failure to designate by name the oral reply officer an invalidating defect. Plaintiff was in a very small facility, far from headquarters, without an adequate personnel staff and it was not unreasonable to delay the designation of an oral reply officer until it was determined that one would be needed.

revisions became part of the record). In these circumstances, this court has upheld the use of such a summary. *Terry* v. *United States*, 204 Ct. Cl. 543, 555–56, 499 F. 2d 695, 701 (1974), *cert. denied*, 421 U.S. 912 (1975). Similarly, the Commission did not err in having the case decided (at the regional level) by officers who were not present at the hearing but who had the benefit of the summary and of plaintiff's revisions. *See Allied Compensation Ins. Co.* v. *Industrial Accident Commission*, 367 P. 2d 409, 411 (Cal. 1962); *Clavier Corp.* v. *United States*, 202 Ct. Cl. 1098 (1973); *Tri-Cor, Inc.* v. *United States*, 198 Ct. Cl. 187, 195, 458 F. 2d 112, 116–17 (1972).

"5. On the merits the decision was supported by substantial evidence on the record as a whole. The Agriculture Department and the Civil Service Commission could find the charges sustained and that plaintiff had not been an acceptable employee over an extended period.

"6. In the light of the record and plaintiff's repeated derelictions, the penalty of removal was not disproportionate or unduly harsh. Plaintiff was permissibly found to be a substandard employee.

"IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is denied, the defendant's cross-motion for summary judgment is granted, and the petition is dismissed."

No. 203–74. APRIL 23, 1976

Fred E. Ringe, Jr.

Civilian pay; dismissal.—On April 23, 1976 the court entered the following order:

Before NICHOLS, *Judge*, Presiding, DURFEE, *Senior Judge*, and BENNETT, *Judge*.

"This back pay and reinstatement claim is before the court on cross motions for summary judgment. The plaintiff, an employee of the National Aeronautics and Space Administration, a Contract Specialist, GS–13, was removed from his position on the grounds of inadequate performance, refusal to follow directions, threats to his supervisor, insubordination, wilful disrespect, and failure to perform duties. Plaintiff took unsuccessfully the customary appeal to the Civil Service Com-

mission (CSC), and with an adverse decision by the Board of Appeals and Review (BAR), he had exhausted his administrative remedies. He sued here within a reasonable time thereafter.

"The issue plaintiff urges principally before us is that his controversies with management and omission to take required steps on time rose out of efforts of management to force plaintiff to award contracts in violation of rules made mandatory with respect thereto by various statutes and regulations. He does not appear to have used the grievance procedures of the agency directly to challenge his receipt of allegedly illegal orders. Whether he could use the review of an adverse personnel action for a kind of collateral attack on agency procurement policies is a novel and interesting question which is not properly before us because it was not properly presented to the BAR. The careful and thorough report of the Appeals Examining Officer contains nothing to show its writer was even aware of the existence of any such issue, and plaintiff's subsequent appeal to the BAR makes no complaint of the omission below to consider it and make findings with respect thereto. The matter is not one for application of the 'plain error' doctrine either by the BAR or by us. Counsel before us explains that the different counsel who appeared before the Commission was inexpert in Government procurement matters. Plaintiff himself, however, was a lawyer and a procurement expert. The constrictions of the adversary system of justice do not permit us to correct counsel's asserted errors in this manner. Agency action cannot be labeled arbitrary and capricious because it failed to consider an issue the parties did not urge. *Michienzi* v. *United States*, 207 Ct. Cl. 484 (1975); *Haynes* v. *United States*, 190 Ct. Cl. 9, 418, F. 2d 1380 (1969).

"Plaintiff appears to have bitterly resented the promotion of another Contract Specialist of previous lower rank than himself, to fill a supervisory position over him, newly created in a reorganization. He would relitigate the propriety of this selection here, but has no standing to do so in this case, having dropped the grievance appeal that directly asserted this selection as a grievance. He admits giving the new supervisor a hard time. The personality clashes that resulted intermingled

with disputes about procurement procedure, in which plaintiff's positions may well have been taken in perfect good faith, though we decline to determine if they were right. Still, a subordinate who, going beyond respectful expression of difference of opinion, creates an 'either he goes or I go' situation, is in all human experience, often the one who has to go.

"We think that we should not approve the Reason for Removal, No. 2, which asserts that plaintiff refused to obey an order unless it was in writing. When it was written down, he did promptly obey it. We think, in the context of a dispute over procurement procedures such as we have here, a subordinate holding a position such as the plaintiff's has a right to demand that an order he deems improper should be put in writing. Certainly there must be some channels open to him, by which to express respectful disapproval, and that one is time honored. Our reservation does not affect the result since his other indications of disapproval of his supervisor, specified in the removal notice, had no justification or palliation and fully support the removal, such as his threats of physical violence, and his verbal abuse.

"Plaintiff's other points have been carefully examined and found lacking in weight here, either because not urged below, or because effectively refuted by defendant. Upon consideration of the record, briefs, and oral argument, we determine that the decision of the BAR here under review was not arbitrary and capricious, not contrary to law, and not lacking in support by substantial evidence. The plaintiff's motion for summary judgment is denied. The defendant's motion for summary judgment is allowed. The petition is dismissed."

Plaintiff filed a petition for writ of certiorari on July 23, 1975.

No. 39–75. APRIL 23, 1976

Karl G. Nilsson

Military pay; courts-martial; right to counsel.—On April 23, 1976 the court entered the following order:

Before COWEN, *Chief Judge*, SKELTON and KASHIWA, *Judges*.

"The parties have filed cross motions for summary judgment. Plaintiff's chief complaint in the case is that he was

not represented by civilian counsel when he chose to resign on an understanding that he would receive a less than honorable discharge in connection with his absenting himself without authority from the United States Army Personnel Control Facility at Fort Ord, California, from August 18, 1970, until January 23, 1971, and from February 18, 1971, to November 10, 1971. In a recent case regarding representation by counsel, the United States Supreme Court held as follows:

> The question of whether an accused in a court-martial has a constitutional right to counsel has been much debated and never squarely resolved. See *Reid* v. *Covert*, 354 U.S. 1, 37 (1957). *Dicta* in *Ex parte Milligan*, 4 Wall. 2, 123, said that 'the Framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the Sixth Amendment, to those persons who were subject to indictment or presentment in the fifth.' In *Ex parte Quirin*, 317 U.S. 1, 40, it was said that 'cases arising in the land or naval forces * * * are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth.'
>
> We find it unnecessary in this case to finally resolve the broader aspects of this question, since we conclude that even were the Sixth Amendment to be held applicable to court-martial proceedings, the summary court-martial provided for in these cases was not a 'criminal prosecution' within the meaning of that Amendment. [Footnotes omitted.]
>
> * * * * *
>
> It seems to us indisputably clear, therefore, that even in a civilian context the fact that a proceeding will result in loss of liberty does not *ipso facto* mean that the proceeding is a 'criminal prosecution' for purposes of the Sixth Amendment. Nor does the fact that confinement will be imposed in the first instance as a result of that proceeding make it a 'criminal prosecution.' When we consider in addition the fact that a summary court-martial occurs in the military community, rather than the civilian community, we believe that the considerations supporting the conclusion that it is not a 'criminal prosecution' are at least as strong as those which were held dispositive in *Gagnon* and *Gault*. [*Middendorf* v. *Henry*, 425 U.S. 25, 33–37 (1976).]

Under that holding the plaintiffs in that case were not entitled to counsel. In the present case plaintiff was allowed military counsel but he claims that he should have been al-

lowed civilian counsel. Plaintiff was not in a "criminal prosecution." We hold that his request of civilian counsel exceeds the criterion regarding representation by counsel in *Middendorf* v. *Henry*, *supra*.

"In view of the holding in *Middendorf* v. *Henry*, *supra*, we do not find it necessary to take up other questions raised by plaintiff.

"IT IS ORDERED that defendant's motion for summary judgment is granted, plaintiff's motion for summary judgment is denied and plaintiff's petition is dismissed."

No. 184–75. APRIL 30, 1976

Robert F. Kenney

Civilian pay; dismissal; laches; prejudice, inadequate showing of.—On April 30, 1976 the court entered the following order:

Before COWEN, *Chief Judge*, NICHOLS and KUNZIG, *Judges*.

"This case comes before the court on defendant's motion for summary judgment, filed September 19, 1975. Plaintiff was removed for cause from his position as Senior Compliance Officer, New York Area Office, Labor-Management Services Administration, U.S. Department of Labor, on September 3, 1971. The removal was affirmed by the Civil Service Commission Board of Appeals and Review on November 6, 1972. On May 21, 1973, the Civil Service Commissioners denied plaintiff's written request for reconsideration. Plaintiff commenced this action for back pay and reinstatement on June 3, 1975. The Government has moved for summary judgment on the sole ground that plaintiff's claim is barred by laches. Upon consideration of defendant's motion, together with plaintiff's opposing brief, the exhibits appended thereto, and defendant's reply, it is concluded that plaintiff's claim is not so barred.

"The defense of laches 'stems from the principle that "equity aids the vigilant, not those who slumber on their rights," and is designed to promote diligence and prevent enforcement of stale claims.' *Wilmot* v. *United States*, 205 Ct. Cl. 666, 685 (1974) (quoting *Powell* v. *Zuckert*, 366 F. 2d 634, 636 (D.C. Cir. 1966)). To establish the defense, the evi-

dence must show both (1) a lack of reasonable diligence by the plaintiff, and (2) resulting prejudice to the defendant. In pay cases, as defendant correctly asserts, this court has frequently found sufficient prejudice in the fact that the Government may be compelled to pay two salaries for the services of a single individual. *See Brundage* v. *United States*, 205 Ct. Cl. 502, 510, 504 F. 2d 1382, 1386 (1974); *Grisham* v. *United States*, 183 Ct. Cl. 657, 663, 392 F. 2d 980, 983, *cert. denied*, 393 U.S. 843 (1968). The defendant, however, must ordinarily make a specific showing that a replacement has in fact been obtained and paid to fill the discharged plaintiff's position during the period of delay. *See Wilmot* v. *United States*, *supra*.

"In sole support of its claim of prejudice in the instant case, defendant presents a single, ambiguous sentence in a one-page affidavit by Mr. Jack A. Warshaw, Assistant Administrator for Field Operations of the Labor-Management Services Administration, to the effect that: 'Mr. Kenney's separation from his position as Compliance Officer was effective September 3, 1971. To the best of my knowledge, the work performed by him has been performed by other Compliance Officers in the New York Area Office since that date.' This is not enough.

"Nor does the evidence otherwise suggest that plaintiff 'slept on his rights' during the relevant period of delay. On the contrary, plaintiff's submissions disclose, among other things, both his financial hardship and his persistent and exhaustive efforts to secure assistance of counsel on the only terms financially possible for him. *See Powell* v. *Zuckert*, *supra*, 366 F. 2d at 637–38.

"On the basis of defendant's inadequate showing of prejudice, coupled with plaintiff's diligent efforts to secure the assistance of counsel, we find that defendant's motion should be denied.

"IT IS THEREFORE ORDERED that defendant's motion for summary judgment be and the same is denied, and the case is remanded to the trial judge for further proceedings."

JUDGMENT ORDERS

PACIFIC FAR EAST LINE, INC. V. THE UNITED STATES

No. 214–70

[206 Ct. Cl. 378, 513 F. 2d 1355]

On February 6, 1976 the court ordered that partial judgment be entered for plaintiff, plus interest thereon as provided by law, in the sum of $811,030.33, as set forth below:

Year	*Tax*	*Assessed interest*	*Total*
1962	$3, 954. 83	$1, 617. 96	$5, 572. 79
1963	406, 472. 06	141, 903. 29	548, 375. 35
1964	199, 426. 17	57, 656. 02	257, 082. 19

The court further ordered that the entry of this partial judgment will in no way affect the parties' rights and liabilities with respect to the issues presently before the court for the years 1962, 1963 and 1964.

ANN S. BENTON V. THE UNITED STATES

No. 101–72

[203 Ct. Cl. 263, 488 F. 2d 1017 (1973), 205 Ct. Cl. 888 (1974)]

By order dated February 20, 1976 the court reopened the judgment order entered for plaintiff on September 13, 1974 (205 Ct. Cl. 888), in the sum of $25,779.74 by increasing that sum in the amount of $6,132.53 to the sum of $31,912.27 of which the sum of $6,132.53 is to be paid as a contribution to the Civil Service Retirement Fund.

FEDERAL LITHOGRAPH COMPANY V. THE UNITED STATES

No. 808–71

Following filing of a recommended opinion by Trial Judge Wood on November 21, 1975, the parties stipulated entry of

judgment, and on February 27, 1976 the court ordered that judgment be entered for plaintiff in the sum of $78,951.32, representing tax in the amount of $21,657, plus deficiency interest in the amount of $4,450.48, or a total of $26,108.04 for the year 1963, tax in the amount of $17,688.08, plus deficiency interest of $2,573.50, or a total of $20,261.58 for the year 1964, tax in the amount of $16,969.22 plus deficiency interest of $1,452.38, or a total of $18,421.60 for the year 1965, and tax in the amount of $13,808.47, plus deficiency interest of $351.63, or a total of $14,160.10 for the year 1966, plus statutory interest as provided by law.

WESTERN PACIFIC RAILROAD V. THE UNITED STATES

No. 257–73

In accordance with the decision of the court in *Sacramento Northern Ry.* v. *United States*, 208 Ct. Cl. 995 (1975), and the agreement of the parties, judgment was entered on March 26, 1976 for plaintiff in the sum of $5,880.92 and defendant's counterclaim was dismissed.

ALBERT H. CARTER V. THE UNITED STATES

No. 127–66

[206 Ct. Cl. 61, 509 F. 2d 1150, 207 Ct. Cl. 316, 518 F. 2d 1199]

On April 2, 1976 the court ordered that judgment be entered for plaintiff in the sum of $5,486.76.

TEXAS INTERNATIONAL COMPANY, ET AL. V. THE UNITED STATES

No. 815–71

[*Consumers Ice Co.* v. *United States*, 201 Ct. Cl. 116, 475 F. 2d 1161 (1973)]

On April 2, 1976 the court ordered that judgment be entered for each plaintiff whose name appears on the sheet attached to the order in the amount set forth opposite each

such plaintiff's name, plus interest on such amount at the rate of six percent per annum from July 1, 1976, until paid.

DYNALECTRON CORPORATION (PACIFIC DIVISION) V. THE UNITED STATES

No. 414–69

[207 Ct. Cl. 349, 518 F. 2d 594]

On April 30, 1976 the court ordered that judgment be entered for plaintiff in the sum of $155,978.

REPORT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

Action was taken by the United States Supreme Court on the parties' petitions for writs of certiorari as follows:

Petitioners	Ct. Cl.	F. 2d	Supreme Court
			Denied
George M. Boyd No. 53–74	207:1	----------	424 U.S. 911 Feb. 23, 1976
Bankers Trust Co., et al No. 89–67	207:422	518:1210	424 U.S. 966 March 22, 1976
Seneca-Cayuga Tribe of Okla., et. al., App. No. 3–74	207:958	----------	425 U.S. 903 March 29, 1976
Seneca-Cayuga Tribe of Okla., et al., App. No. 4–74	207:959	----------	425 U.S. 904 March 29, 1976
Mescalero Apache Tribe, et al., App. No. 2–74	207:369	518:1309	425 U.S. 911 April 5, 1976
Elizabeth Kline Jordan No. 433–66	207:1059	----------	425 U.S. 912 April 5, 1976

UNITED STATES v. TESTAN ET AL.

No. 128–72

[205 Ct. Cl. 330, 499 F. 2d 690; 420 U.S. 923; 424 U.S. 392]

Plaintiffs, Government trial attorneys with civil service grade GS–13, having been denied job reclassification to GS–14, filed their petition in the Court of Claims seeking back pay from 1970 and reclassification. Plaintiffs contended that their duties and responsibilities met the requirements for the higher grade and were identical to those of other trial attorneys classified as GS–14 in another agency and that under the principle of "equal pay for substantially equal

work" prescribed in the Classification Act they were entitled to the higher classification. In an opinion dated July 19, 1974, 205 Ct. Cl. 330, 499 F. 2d 690, the court, *en banc*, held that if the Civil Service Commission were to determine that it had made an erroneous classification the court was authorized to award money damages for back pay lost, that the CSC's refusal to compare plaintiffs' positions with those of the other trial attorneys was arbitrary and capricious, and that the court had power to order the CSC to reconsider its classification decision, and remanded the case to the CSC to make the comparison and to report the result to the court. On defendant's petition for certiorari, the Supreme Court in an opinion dated March 2, 1976, reported at 424 U.S. 392, reversed the court's judgment and held that the Tucker Act does not in itself support the action taken by the Court of Claims, and that neither the Classification Act nor the Back Pay Act creates a substantive right in federal employees to back pay for the period of the alleged wrongful classification, and remanded the case "with directions to dismiss the respondents' petition."

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